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In The

Supreme Court of the United States

VICTORIA L. BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California,

Petitioners,

v.

G & G FIRE SPRINKLERS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether every instance of nonpayment to a private contractor by a state agency under a commercial contract constitutes a deprivation of due process.

2. Whether action within the absolute discretion of a private party constitutes state action.

3. Whether a third party not targeted by a statute suffers a denial of due process where the impact suffered is at most indirect.

4. Whether a contractor who has not alleged that he has an entitlement to public funds can state a claim for denial of due process based on the state's withholding of said funds.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Victoria L. Bradshaw[1], Lloyd W. Aubry, Jr.[2], Daniel Dellarocca, Roger Miller, Rosa Frazier, the Division of Labor Standards Enforcement, and the Department of Industrial Relations of the State of California (collectively, "State petitioners"), pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled action on May 1, 2000.

OPINIONS BELOW

The judgment of the District Court, entered on November 9, 1995, is not reported but is reprinted in the appendix to this petition at A-85. The original opinion of the United States Court of Appeals for the Ninth Circuit is reported at 136 F.3d 587 (9th Cir. 1998) and is reprinted at A-52. The Ninth Circuit issued a subsequent order and amended opinion on September 10, 1998, reported at 156 F.3d 893 (9th Cir. 1998), and reprinted at A-16. On October 28, 1998, the Ninth Circuit issued an order denying the State's petition for rehearing, reprinted at A-88. Following the October 28, 1998 order denying the petition for rehearing, the State filed a Petition for Writ of Certiorari with this Court, which petition was granted on April 19, 1999 (526 U.S. 1061). This Court summarily vacated the judgment below and remanded the case for further consideration in light of *American Manufacturer's Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 119 S. Ct. 977 (1999). The Ninth Circuit issued yet a third opinion in this

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[1] Victoria L. Bradshaw was sued in her official capacity as Labor Commissioner of the State of California, a position she held when this litigation commenced. That position is presently held by Arthur S. Lujan.

[2] Lloyd W. Aubry, Jr., was sued in his official capacity as Director of the Department of Industrial Relations of the State of California, a position he held when this litigation commenced. Stephen Smith is the current Director.

case on February 23, 2000, reported at 204 F.3d 941 (9th Cir. 2000) and reprinted at A-1.

JURISDICTION

The Ninth Circuit issued its amended opinion and order on February 23, 2000. A timely petition for rehearing and rehearing en banc was denied on May 1, 2000. This petition for writ of certiorari is filed within ninety days of the denial of rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment of the United States Constitution provides, in relevant part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . . "

42 U.S.C. § 1983 provides, in relevant part, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The relevant California statutory provisions are reproduced in the appendix at A-77, and include California Labor Code §§ 1720, 1727, 1729, 1730, 1731, 1732, 1733, 1771, 1772, 1773, 1773.2, 1774, 1775, 1776, and 1813, and California Civil Code §§ 3103, 3181, 3184, 3186, 3210.

STATEMENT OF THE CASE

A. Facts

Petitioners are state officials and state agencies, *i.e.*, the Division of Labor Standards Enforcement (hereinafter "DLSE") and the Department of Industrial Relations,

responsible for the enforcement of California prevailing wage law. Respondent, G&G Fire Sprinklers, Inc. (hereinafter "G&G"), is a fire protection company that installs fire sprinkler systems. G&G both contracts directly with building owners or, as here, agrees to perform fire sprinkler installation solely as a subcontractor for a prime contractor. When the building owner is a California governmental entity, the construction work is a "public work."[3] On public works, the prime contractor agrees, in its contract with the governmental entity, that its construction workers, and those of the subcontractors whom it later selects to execute the contract, will be paid "prevailing wages."[4] (A-9, 10.)

This case arose when DLSE, pursuant to California Labor Code § 1727, having discovered after investigation prevailing wage law violations concerning three separate projects undertaken by G&G, a subcontractor, issued notices to withhold public works contract payments from the prime contractors on these projects. This investigation also disclosed a failure to provide DLSE with certified payroll records, an additional violation of law. Following issuance of the notices to withhold, the awarding bodies for each of the projects withheld money from the prime contractors. The prime contractors, in turn, withheld from G&G payments otherwise due under their subcontracts, as authorized by California Labor Code § 1729.

The obligation to pay prevailing wages on a public works project, and to provide DLSE with certified payroll

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[3] The term "public work" is defined at Cal. Labor Code § 1720 to include "construction, alteration, demolition, or repair work done under contract and paid in whole or in part out of public funds. . . . "

[4] Prevailing wages are fixed for each construction craft or classification in the locality in which the public work is performed. The procedure for determining prevailing wages is set out at Cal. Labor Code § 1773.

records, is founded upon both statute and contract. California Labor Code sections 1771 and 1774 require contractors and subcontractors to pay prevailing wages to all workers employed on a public works project. California Labor Code section 1776(a) requires all public works contractors to maintain certified payroll records and to make them available to the State on request. These requirements to pay prevailing wages and maintain certified payroll records must be included as an express stipulation in any such public works contract. (Cal. Labor Code § 1773.2, 1775, and 1776(h)).

California Labor Code § 1775 provides for penalties if workers are paid less than the prevailing wage, and requires that every public works contract contain provisions authorizing the imposition of these penalties. Likewise, as a matter of state law, all public works contracts must contain provisions authorizing the imposition of penalties for failure to provide DLSE with certified payroll records. (Cal. Labor Code § 1776(g) and (h)).

Thus, each of the prime contractors that subcontracted work to G&G had agreed to the following contractual provisions in their public works contracts with the respective awarding bodies: (1) that prevailing wages would be paid to all workers employed on the project by the prime contractor and its subcontractors, (2) that certified payroll records would be kept, and provided to DLSE upon request, showing the hours worked and wages paid to all workers employed on the project by the prime contractor and its subcontractors, and (3) that the public agencies that had awarded the contracts could withhold contract payments to these prime contractors to cover unpaid wages and penalties if the agreements were breached (A-90).

Pursuant to California Labor Code § 1727, the public entity that awarded the contract must "withhold and retain therefrom all wages and penalties which have been forfeited pursuant to any stipulation in a contract for public work, and the terms of this chapter." The withholding must be preceded by a "full investigation" by

either the DLSE or by the awarding body, except in the case of a final payment.

A withholding of payments from a prime contractor for unpaid prevailing wages and penalties can be challenged by filing a lawsuit to recover the withheld funds.[5] (Cal. Labor Code § 1730-1733.) Any such funds withheld from a public works contractor must be retained by the awarding body for 90 days following the completion of the contract. During that period, the contractor or his or her assignee may file a state court breach of contract action against the awarding body to recover the withheld funds. This breach of contract action "is the exclusive remedy of the contractor or his or her assignees" for the recovery of withheld wages and penalties. (Cal. Labor Code § 1732.) The action may be filed "without permission from the state or other authority," and it is "limited to the recovery of the wages or penalties" without prejudice to any other rights or issues arising under the contract. (Cal. Labor Code § 1733.) If an action is not brought within this retention period, the withheld funds are disbursed to the underpaid workers. If an action is brought within the retention period, the money is held in escrow until its resolution. These statutory provisions have been in effect for over sixty years.

Pursuant to California Labor Code § 1729, a prime contractor who has had a payment withheld by a public agency as a result of a subcontractor's failure to comply with its prevailing wage obligations can in turn withhold that amount from the funds the prime contractor would otherwise owe to the subcontractor under the subcontract. With an assignment from the prime contractor,

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[5] The public agency which is buying the construction work (pursuant to the various specifications, including the agreement to pay the prevailing wage) is buying the construction work from the prime contractor – not its subcontractors, who may be unknown to the public agency at the time the contract is awarded. The withholding under Cal. Labor Code § 1727 is only from payments to the prime contractor.

the subcontractor can then file a breach of contract action under California Labor Code § 1730-1733 to recover these funds from the public agency. If the subcontractor proceeds by way of assignment, that lawsuit is the subcontractor's exclusive remedy for the recovery of the withheld funds. (Cal. Labor Code § 1732.) But if the subcontractor does not obtain an assignment, the subcontractor can pursue an alternative statutory remedy under the California Civil Code, consisting of the right to file a "stop notice", setting forth the amount owed by the prime contractor to the subcontractor for work performed under the subcontract. The stop notice is filed with the public agency that awarded the contract. (Cal. Civil Code § 3103, 3181, 3184.) Upon receipt of a timely stop notice, the public agency is obligated to withhold from the prime contractor an amount sufficient to pay the claim stated by the subcontractor. (Cal. Civil Code § 3186.) The subcontractor may file "an action against the [prime] contractor and the public entity to enforce payment of the claim stated in the stop notice . . . at any time after 10 days from the date of the service of the stop notice upon the public entity. . . . " (Cal. Civil Code § 3210.)

Disdaining utilization of any of its viable state law remedies, G&G filed a lawsuit against these petitioners in the United States District Court for the Central District of Los Angeles.

B. Proceedings Below

1. The District Court Proceedings

G&G brought this action for declaratory and injunctive relief under 42 U.S.C. §§ 1983 and 28 U.S.C. § 2201-2202, claiming that the issuance of the notices to withhold without a prior hearing constituted a deprivation of property without due process of law, in violation of the Fourteenth Amendment. The state responded with a motion to dismiss, and G&G later filed a motion for summary judgment. The district court denied the state's

motion to dismiss and granted G&G's motion for summary judgment. The district court's judgment declared §§ 1727, 1730-1733, 1775, 1776(g) and 1813 of the California Labor Code unconstitutional, and enjoined the state from enforcing those statutes against G&G.

2. The Ninth Circuit Proceedings

On February 3, 1998, Judge Hawkins, joined by Judge Reinhardt, issued an opinion, in part affirming and in part reversing the district court, and remanding the case for further proceedings consistent with the opinion. Judge Kozinski vigorously dissented. The panel majority held that due process requires that the state provide a subcontractor with either a pre- or prompt post-deprivation hearing when withholding payments from a public works contractor for unpaid wages or penalties. This holding is founded upon the majority's view that a subcontractor "has a property interest in being paid in full for the construction work it completed," and that this interest, which "arises from its[6] public works contract", is protected by the Due Process Clause. 136 F.3d at 595-597 (A-63, footnote added.) The panel also concluded, however, that the district court's injunction was overbroad in that the challenged withholding provisions, while unconstitutional as applied, were not facially invalid.

In his dissent, Judge Kozinski protested the majority's "categorical approach that turns every right to receive payment on a public works contract into a property right protected by due process." 136 F.3d at 602 (A-81) Instead, Judge Kozinski maintained that any rights

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[6] No party contended at any stage in this litigation that G & G, with respect to the three public works contracts at issue herein, was anything but a subcontractor – i.e., that it (rather than the prime contractors) had entered into any contracts with these public agencies.

arising under commercial contracts, such as service contracts, material supply contracts, and construction contracts, are not protected by the Due Process Clause.

Judge Kozinski warned that the majority decision not only conflicts with the opinions of other circuits, but that it is "very bad policy" because it saddles the state, when it engages in "the purely commercial activity of construction", with "a burden not suffered by private builders", who routinely put provisions for payment withholdings for failure (or suspected failure) of performance into their private construction contracts. 136 F.3d at 602 (A-81) Judge Kozinski explained that payment withholdings are consistent with the awarding bodies' activities as market participants, and that any contractor or subcontractor who objects to provisions for withholdings is free not to do business with the state. Consequently, a dispute over withholdings is nothing more than a "run-of-the-mill contract dispute", for which the subcontractors' remedy lies in a state court breach of contract action against the prime contractor, or, as an assignee of the prime contractor, against the awarding body. 136 F.3d at 603 (A-82)

Finally, Judge Kozinski cautioned that drastic consequences would result from the majority decision, as due process requirements would inexorably apply to *any* withholding of payments under any commercial contract with the state, be it a withholding for failure to pay prevailing wages, or in more mundane instances, a failure to complete a project on time or a failure to comply with applicable building codes.

3. Rehearing

The State petitioned for rehearing. This petition was granted, and on September 10, 1998, the panel issued an amended opinion and order. 156 F.3d 903. Once again, the panel split with Judge Kozinski in the minority. The only significant change in the majority's opinion is its concession that "the state's interest in ensuring payment of prevailing wages is sufficiently important to justify the

withholding of funds pending the outcome of whatever kind of hearing may be afforded." 156 F.3d at 903 (A-18), internal citation and quotation omitted.) Thus, the majority concluded that a pre-deprivation hearing is not required, but that a prompt post-deprivation hearing is necessary to satisfy due process requirements.

In his dissent to this amended opinion, Judge Kozinski found that under California law, every subcontractor who wishes to challenge a withholding has an adequate state law remedy. Under California Labor Code § 1733, a subcontractor with an assignment from the contractor can file a breach of contract action against the awarding body to recover sums withheld. Furthermore, Judge Kozinski noted, any subcontractor unable to obtain an assignment but whose payment had been withheld by the prime contractor could bring suit against the awarding body under various state law theories. 156 F.3d at 909 (A-50).

The panel majority, however, concluded that even if the aggrieved subcontractor could bring an action on the contract, that would not be sufficient. While conceding that this Court has held that in certain circumstances, a post-deprivation state court action may fulfill the requirements of due process, the majority held that the right to bring a breach of contract action to recover withheld payments, when the withholding was carried out by state officials pursuant to state policy, does not provide adequate due process.

On October 28, 1998, the court entered an order denying a petition for rehearing, indicating however that Judge Kozinski had voted to grant the petition for rehearing and to accept the suggestion for rehearing en banc.

4. Certiorari in the Supreme Court

Petitioners petitioned for a Writ of Certiorai. This Court granted the petition on April 10, 1999, summarily vacating the Ninth Circuit's judgment and remanding the

case back for further consideration in light of *American Manufacturer's Mutual Insurance Co. v. Sullivan, supra.*

5. Additional proceedings in the Ninth Circuit

Following additional oral argument, the Ninth Circuit issued a third opinion on February 23, 2000. Determining that its prior reasoning "fits comfortably within the analytic framework set forth in *Sullivan*", Judges Hawkins and Reinhardt reinstated the prior judgment and opinion (204 F.3d 941) (A-1). Judge Kozinski again vigorously dissented, pointing out that "*Sullivan* fits the majority's rationale about as comfortably as Cinderella's slipper on the wicked step-sister's foot." He pointed out as well that, under the analysis mandated by this Court in *Sullivan*, the withholding by the prime contractor of funds from G&G was purely private conduct. Continuing on, he observed that the claim of G&G did not qualify as a valid property interest without a showing that G&G had met the prevailing wage requirements.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision conflicts with and constitutes a radical departure from the decisions of several other circuits, and raises important questions of federal law which this Court should resolve. The issue of whether a private company contracting with a state agency has a property right to payment within the meaning of the Due Process Clause of the Fourteenth Amendment is of paramount importance and affects every state, county, city, school district, and special use district in the nation. The additional issues of 1) whether a state is responsible for private action by contractors contracting with the state who take discretionary action against their subcontractors and 2) whether third parties who are indirectly impacted by governmental conduct have stated a claim for relief against a state are of manifest importance as well to state and local governments. Review of these issues by this Court is now imperative because the G&G

decision constitutes a drastic departure from the conclusions other circuits have reached when faced with these questions.

A. The Court's Determination That Constitutionally Protected Property Rights Can Be Founded Upon Any Breach Of A Commercial Contract With A State Agency Is In Conflict With Every Other Circuit That Has Considered This Issue And Threatens To Shift The Whole Body Of State Public Contract Law Into The Federal Courts.

The Ninth Circuit expressly determined that G&G's interest in getting paid in full under its public works contract constituted a cognizable due process property right under the Fourteenth Amendment (A-30). As the carefully considered dissent of Judge Kozinski makes clear, the reductio ad absurdum of this novel conclusion is that every failure by the state to pay its bills on time would necessarily equate to an actionable constitutional violation in the federal courts. An obvious conflict presently exists between the Ninth Circuit's position on this point, as reflected in this decision, and the pronouncements of all other circuits that have considered the matter, with the Ninth Circuit being clearly the "odd man out" with respect to this question.

The Second Circuit in *S & D Maintenance Co. v. Goldin*, 844 F.2d 962 (2nd Cir. 1988), *Martz v. Village of Valley Stream*, 22 F.3d 26 (2nd Cir. 1994), and *Christ Gatzonis Electrical Contractor, Inc. v. New York City School Construction Authority*, 23 F.3d 636 (2nd Cir. 1994), e.g., has held that ordinary construction and supply contracts do not create property interests protected by the Fourteenth Amendment.

In each of these Second Circuit cases, contractors filed actions under 42 U.S.C. § 1983 against public agencies that had withheld contract payments, asserting that the withholdings without hearings constituted a violation of due process. The Second Circuit held that the contractual relationship between a contractor and a public

agency does not create a constitutionally protected interest in the payment of sums allegedly due pursuant to the contract. In a careful analysis that distinguishes between ordinary contract rights and property rights that are protected under the Due Process Clause, the Second Circuit reasoned:

> "An interest in enforcement of an ordinary commercial contract with a state is qualitatively different from the interests the Supreme Court has thus far viewed as 'property' entitled to procedural due process protection. . . . [T]he Due Process Clause is invoked to protect something more than an ordinary contractual right. Rather, procedural protection is sought in connection with a state's revocation of a status, an estate within the public sphere characterized by a quality of either extreme dependence in the case of welfare benefits, or permanence in the case of tenure, or sometimes both, as frequently occurs in the case of social security benefits. . . . But we hesitate to extend the doctrine further to constitutionalize contractual interests that are not associated with any cognizable status of the claimant beyond its temporary role as a government contractor." *S & D Maintenance Co., supra,* 844 F.2d 966-67.

This analysis, distinguishing ordinary contract rights from the sort of property that is protected by due process, resonates in the decisions of other circuits as well. Justice Breyer, then on the First Circuit, wrote: "A mere breach of a contractual right is not a deprivation of property without constitutional due process of law. . . . Otherwise virtually every controversy involving an alleged breach of contract with a governmental institution or agency or instrumentality would be a constitutional case." *Bleeker v. Dukakis,* 665 F.2d 401, 403 (1st Cir. 1981). The Seventh Circuit, in affirming the dismissal of a section 1983 action brought by county employees asserting that the county violated their due process rights by its refusal to abide by

a contract to permit time off in compensation for overtime hours worked, cautioned that "[t]here is reason to doubt whether the Fourteenth Amendment was intended to allow every person with a breach of contract claim against a state to bring that claim in federal Court", and that the Amendment was "not intended to shift the whole of the public law of the states into the federal courts." *Brown v. Brienen,* 722 F.2d 360, 364 (7th Cir. 1983).

The Third Circuit, has likewise observed that "if every breach of contract by someone acting under color of state law constituted a deprivation of property for procedural due process purposes, the federal courts would be called upon to pass judgment on procedural fairness of the processing of a myriad of contract claims against public entities," and that "the wholesale federalization of state public contract law seems far afield from the great purposes of the Due Process Clause." *Reich v. Beharry,* 883 F.2d 239, 242 (3rd Cir. 1989). Following this analysis, the Third Circuit upheld a summary judgment against a building contractor as to a section 1983 claim asserting a property interest in its contract with a city housing authority, while permitting the contractor's claim for unpaid compensation for work allegedly performed under the contract to proceed under the state public contract law. *Linan-Faye Construction Co., Inc. v. Housing Authority of the City of Camden,* 49 F.3d 915 (3rd Cir. 1995). The court further held that whatever severe consequential damages the contractor may have suffered as a result of the housing authority's allegedly wrongful retention of the contractor's performance bond, that fact "cannot convert a contract claim into a deprivation of liberty." *Ibid.,* at 932.

With its decision in *G&G,* the Ninth Circuit became the only circuit to find an enforceable property right under the Fourteenth Amendment in a contract between a public agency and a contractor. Prior to *G&G,* the Ninth Circuit stood in the mainstream of federal law on the issue. In *San Bernardino Physicians' Services Medical Group, Inc. v. County of San Bernardino,* 825 F.2d 1404, 1408 (9th

Cir. 1987), the court explained "[e]ven though every contract may confer some legal rights under state law, that fact alone need not place all contracts within federal due process protection." In drawing the line between those government contracts that may create rights that are protected by the Fourteenth Amendment and those that do not, the court focused on the distinction between employment contracts and ordinary commercial contracts, such as contracts to perform a construction project or to supply the state with services or materials. "The right of an individual not to be deprived of employment that he or she has been guaranteed is more easily characterized as a civil right, meant to be protected by section 1983, than are many other contractual rights." *Ibid.*, at 1409. Consequently, "the farther the purely contractual claim is from an interest as central to the individual as employment, the more difficult it is to extend it constitutional protection without subsuming the entire state law of public contracts." *Ibid.* Based on this analysis, the court held that a corporation's contract to supply medical services to a county hospital does not implicate any constitutionally protected interest, and that such a "contract to supply services to the state cannot sensibly be distinguished from construction contracts or even purely material supply contracts, for purposes of federal protection." *Ibid.*, at 410.

The *G&G* panel majority abandoned this restrained approach in favor of a sweeping expansion of property rights and due process protections. G&G's constitutional claim, according to the panel majority, "arises from its public works contract; it has a property interest in being paid in full for the construction work it has completed." (A-30) Assuming, *arguendo*, that a subcontractor that lacks privity of contract with an awarding body can nonetheless assert a claim based on the awarding body's contract with the prime contractor, the question that must be carefully addressed is whether, under either the public

works contract or applicable state law, there is an entitlement to prompt payment in full once the job is purportedly completed. The answer to this question is that under the California prevailing wage law, and under the contracts that G&G relies on as a basis for its due process claim, there is no entitlement to payment of sums withheld for unpaid wages and penalties. These contracts expressly provide for the withholding of payments to cover unpaid wages and penalties. The contractor's right to payment in full is contingent not only on completion of the work, but also, on the contractor's and its subcontractors' compliance with prevailing wage and certified payroll record keeping requirements.

In both *S & D Maintenance* and *Christ Gatzonis Electrical Contractor*, the Second Circuit held that there can be " 'no legitimate claim of entitlement' to funds allegedly due" pursuant to "a contract [that] vested the municipal official with discretion to withhold interim payments." *Christ Gatzonis Electrical Contractor, Inc., supra*, 23 F.3d at 640. This holding stems from the application of the well known test adopted in *Board of Regents v. Roth*, 408 U.S. 564, 576-78, 92 S. Ct. 2701, 2708-09, 33 L. Ed. 2d 548 (1972). Under this test, "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . . " 408 U.S. at 577, 92 S. Ct. at 2709.

In contrast, the Ninth Circuit *G&G* panel majority looks beyond state law, and beyond the state's contracts, to the Constitution as an independent source of property rights. Ultimately unable to find any basis for G&G's asserted property interest in the provisions of the public works contracts or in state law, the panel majority relies on *Snaidach v. Family Finance Corp.*, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969) to conclude that although G&G has no right to prompt payment (and no right to a deprivation hearing) under the state's statutory scheme, any withholding under this scheme is constitutionally infirm. *Snaidach*, however, is inapposite. In a garnishment

case, such as *Snaidach*, a creditor seeks to seize funds that are indisputably owed by a third party to the debtor. The funds being seized are the debtor's property. In contrast, in a public works contract case such as this, there is inevitably a substantive dispute between the immediate parties to the contract as to whether the contract requires payment of the amounts withheld. The awarding body did promise to make the payment; but the contractor promised, inter alia, that prevailing wages would be paid and that certified payroll records would be kept and made available as conditions precedent to receiving payment. To say that the contractor is entitled to the withheld funds, and therefore that the state's failure to make payment has deprived the contractor of its "property" without due process of law, is to decide the merits of the substantive dispute – a dispute founded upon a breach of contract claim – between the contracting parties.[7]

If the Ninth Circuit's reasoning on this point is to stand as legal precedent, then every failure by a state, county or municipality to pay its bills on time will arguably constitute an actual deprivation of due process. Under this misconceived theory every contractual sow's ear is to be converted to a constitutional silk purse. The result, which a more circumspect Ninth Circuit earlier warned against in *San Bernardino Physician Services, supra*, and the Seventh Circuit warned against in *Brown v. Brienen, supra*, will be the inevitable shifting "of the whole of the public law of the state into the federal courts", courts which are already overburdened with a demanding caseload. For the first time, federal district courts will be required to routinely adjudicate local construction disputes, including but not limited to claims

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[7] As the California courts have held "[u]nder the statutory scheme presently before us, in acting pursuant to Labor Code section 1727 the state did not take property belonging to plaintiffs; rather it withheld sums pursuant to the terms of its contract with plaintiffs." *O.G. Sansone Co. Department of Transportation* (1976) 55 Cal. App. 3d 444, 455, 127 Cal. Rptr. 799.

concerning the adequacy of plumbing, heating and air conditioning improvements and compliance or noncompliance with state and municipal building codes.

B. The Standard Adopted By The Ninth Circuit For Determining Whether Or Not State Action Exists Directly Conflicts With This Court's Explicit Guidelines And Instructions In *Sullivan*

As aforementioned, upon the vacating of the Ninth Circuit's decision by this Court, the case was remanded to the Ninth Circuit for further consideration in light of *American Manufacturers' Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 119 S. Ct. 977 (1999). The instructions of this Court were apparent and unmistakable: G&G's rights in this action, if any, were to be reexamined in light of the express teachings of *Sullivan*. While the majority of the panel gave lip service to *Sullivan*, in actuality it rendered a decision which clearly disregards its principles.

Respondents in *Sullivan* attacked on due process grounds a Pennsylvania law authorizing the withholding by private insurers of medical benefits from employees in workers compensation cases without a hearing where the insurer submitted a form to the State contesting the reasonableness or necessity of the treatment provided. Respondents argued that these benefits could not be withheld by the insurers without a hearing. An issue also arose concerning whether the withholding of medical payments pursuant to the Pennsylvania law by the insurers constituted state action within the meaning of 42 U.S.C. § 1983. This Court rejected all of respondents' arguments, expressly finding, *inter alia*, that the withholding by the insurers was not state action.

Petitioners herein contend that on the issue of state versus private action, the operative facts in this case are strikingly similar to those in *Sullivan*. G&G was a subcontractor under a public works contract. California law authorizes DLSE to issue a notice to withhold funds from the prime contractor on a public works project if his

workers or the workers of his subcontractors have not been paid the prevailing wage. Upon issuance of the notice to withhold, the awarding body withholds an equivalent amount from the funds otherwise due the prime contractor. California Labor Code §§ 1727, 1774, 1775. There is no requirement in the law that the amount withheld from the prime contractor must likewise be withheld by the prime contractor from the subcontractor. The awarding body does not itself deduct any funds from the subcontractor. Section 1729, however, allows the prime contractor to deduct a like amount from its payments to the subcontractor "on account of the subcontractor's failure to comply with" the prevailing wage law, if the prime contractor chooses to do so. Here, funds were withheld from G&G's prime contractor after the issuance of notices to withhold pursuant to these code sections and the prime contractor decided, in its sole discretion, and as a self-help remedy, to deduct a like amount from the money it may have otherwise owed G&G. Indeed, whether the prime contractor owed any funds to G&G in the first instance under the terms of its subcontract with G&G is unknown.

As in *Sullivan*, the inquiry must begin in this case with the threshold principle that section 1983 "excludes from its reach merely private conduct, no matter how discriminatory or wrongful." 526 U.S. 40, 48 (1999). Under this basic tenet of law, the federal courts have no jurisdiction over a 1983 action unless the plaintiff can plead and prove that there was demonstrable state action.

The issue of state action under section 1983 has long been litigated in the federal courts, with the result that several well-established principles have emerged. Thus, it has been concluded that the fact, standing alone, "that a business is subject to state regulation does not convert its action into that of the State for purposes of the Fourteenth Amendment." *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S. Ct. 2777 (1981); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350, 95 S. Ct. 449 (1974). It is also clear that a

plaintiff seeking relief under section 1983 must affirmatively show "a sufficiently close nexus" between the State and the challenged action so that "the latter may be fairly treated as that of the State itself." *Blum, supra*, 457 U.S. at 1004. Finally, the State can be held responsible for private action "only when it has exercised coercive power or has provided significant encouragement, either overt or covert, that the choice must in law be deemed that of the State." *Blum, supra*, 457 U.S. at 1004; *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 166, 98 S. Ct. 1789 (1978).

In deciding *Sullivan*, this Court expressly confirmed these longstanding principles. Its opinion points out that "action taken by private entities with the mere approval or acquiescence of the State is not state action." Going further, in words that echo resoundingly in this case, this Court declared that "[t]he mere availability of a remedy for wrongful conduct even where that remedy serves important public interests does not so significantly encourage the private entity so as to make the State responsible for it." 526 U.S. 40, 49.

The application of these principles in light of *Sullivan* made it abundantly clear the result required in this case. There, as here, the state law authorized a private business to withhold funds under certain conditions. In *Sullivan*, withholding was justified if the employer or insurer suspected that the treatment was not reasonable or necessary and filed a form with the state to that effect. In this case withholding is only authorized under section 1729 "on account of the subcontractor's failure to comply" with the law. In both cases the applicable statute did not mandate withholding by the third party, it only permitted it. The decision whether or not to withhold was in the sole discretion of the private party, not the sovereign.

There can accordingly be no logical distinction between the effect of the withholding sanctioned by California law in this case and the effect of the withholding which survived judicial scrutiny in *Sullivan*. If anything, there is arguably lesser participation by the State in this case than there was in *Sullivan*, since there the actual

withholding required government approval, albeit pro forma approval, while here no official approval was mandated by law prior to withholding. Otherwise, with respect to the operative factors discussed by the Supreme Court, this case and *Sullivan* are indistinguishable in law. The result in *Sullivan* with respect to the issue of state action clearly compelled a similar result in this case.

As in *Sullivan*, all the State did here was to provide a remedy to the prime contractor, a remedy for relief from the subcontractor's violations of the prevailing wage law. The State of California did not mandate utilization of this remedy any more than the State of Pennsylvania mandated withholding. The teaching of *Sullivan* is unequivocal: "[p]rivate use of state-sanctioned private remedies does not rise to the level of state action." 526 U.S. 40, 49.

The majority of the Panel concluded that the "withholding here was specifically directed by State officials in an environment where the withholding party had no discretion at all" (204 F.3d at 944). This statement, the factual cornerstone of the Panel majority's reasoning in this case, represents a confusion of two separate and distinct events. It refers both to the issuance by DLSE of notices to withhold to the awarding body, who then withholds from the prime contractor, on the one hand, and the possible withholding from the subcontractor by the prime contractor, on the other. But the actual taking by the prime contractor from the subcontractor, which is the act complained of in this case, consists solely in the discretionary withholding by the prime contractor, a private party, from the subcontractor. The prime contractor has the absolute power to withhold or not withhold. If the majority was confused about this distinction, Judge Kozinski was not, as he correctly points out in his dissent the problem with the majority's reasoning:

> "This would be true had the prime contractor been ordered, under penalty of law, to withhold funds from G&G. It was not. The only entity 'specifically directed' to withhold funds was the awarding body, which withheld funds only from the prime contractor, not from G&G. While the challenged provisions authorized – even encouraged – the prime to withhold an equivalent amount from G&G, the prime was free to pay G&G the full amount specified by the contract. *Sullivan* clearly holds that mere authorization and encouragement do not render a private entity's decisions 'fairly attributable' to the state. 119 S. Ct. at 986. Under *Sullivan*, then, the prime contractor who chose to deprive G&G of its alleged property was not a state actor" (A-8-A-9).

Here, as in *Sullivan*, there was no evidence before the Court to show that the action of the private entity complained of was the result of either the "coercive power" or "significant encouragement" of the State. The actual evidence, in fact, was plainly to the contrary. The prime contractor may indeed under the particular circumstances prevailing at the time, find it in his business interest to withhold funds from the subcontractor, but he clearly need not do so,[8] and, in fact, he need fear no adverse response from the state if he chooses not to withhold, the state being satisfied to receive the money it claims is owed.

Federal decisions in other circuits since *Sullivan* was decided have, unlike the Ninth Circuit, faithfully applied its teachings with respect to the issue of state versus private action in a variety of factual situations. In *Lansing v. Memphis*, 202 F.3d 821, 831-833 (6th Cir. 2000) a private nonprofit corporation authorized by the City of Memphis to promote tourism in a "Memphis in May" program in a park owned by the city was determined not to be a state actor when it excluded a preacher from the park with the

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[8] A prime contractor might decline to withhold from the subcontractor, for example, because the former is holding substantial funds payable to the latter as progress payments in the future.

assistance of local police. In *Austin v. Paramount Parks, Inc.*, 195 F.3d 1727 (4th Cir. 1999) a private security guard at an amusement park was held not to be engaged in state action despite the fact he obtained an arrest warrant through the auspices of a local county sheriff. *See also* discussions of the state action criteria of *Sullivan* in *DeBauche v. Trani*, 191 F.3d 499, 507-508 (4th Cir. 1999) and *Perkins v. Lombardy Basketball Club*, 196 F.3d 13, 19 (1st Cir. 1999).

The reasoning of the Ninth Circuit, as we have seen, is grounded on misconceived "facts", i.e., that the prime contractor had no choice but to withhold from the subcontractor. This statement has no support in the record and is plainly at variance with the true circumstances. The undisputed truth is that the prime contractor had the absolute discretion to withdraw or not withdraw funds from the subcontractor. It was not compelled to do the former. Where, as here, the evidentiary underpinnings for a determination fall, the determination itself must fall.

G&G's claim accordingly lacks a fundamental jurisdictional element under section 1983, the element of state action. It was evident from the record that G&G would never be able to cure this defect. The case should accordingly have been remanded to the District Court with instructions to dismiss this action with prejudice for lack of jurisdiction.

C. The Ninth Circuit Misapplied The Established Rule Concerning Indirect Deprivations And Due Process

A companion issue to the issue of state versus private action is the question of whether G&G was foreclosed from proceeding against petitioners because the action of the State in withholding funds from the prime contractor only impacted G&G indirectly.

The sole action taken by petitioners, i.e., the issuance of notices to withhold to the contracting public bodies based on G&G's noncompliance with the prevailing wage law, was taken solely against the prime contractors, who

thereafter unilaterally chose to withhold monies due G&G for work performed under its subcontracts. While the law allows the prime contractor to deduct wages and penalties from the subcontractor, the decision is that of the prime contractor, not the state. Petitioners have contended all along that the alleged deprivation of G&G's rights is indirect at best (A-66).

> "Over a century ago this Court recognized the principle that the due process provision . . . does not apply to the *indirect adverse effects* of governmental action. Thus, in the *Legal Tender Cases*, 12 Wall. 457, 551, the Court stated:
>
> > 'That provision has always been understood as referring only to a *direct* appropriation, and not to consequential injuries resulting from the exercise of legal power. It has never been supposed to have any bearing upon, or to inhibit laws that *indirectly* work harm and loss to individuals.' "

O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 788-789, 100 S. Ct. 2467 (1980) (emphasis added).

The Ninth Circuit refused to apply the principle of *O'Bannon* and its progeny, finding that G&G, as a subcontractor, was the "target of the state's action here" (A-67) and that, therefore, this case falls within an exception noted in *O'Bannon*, i.e., where action is taken by one party for the purpose of "punishing" another. Appellants submit, however, that this is yet another misreading of the record in the case by the Ninth Circuit, there being absolutely no evidence to support the conclusion that either the intent or the policy of the state in enforcing the prevailing wage law was at any time to target or punish G&G, or other subcontractors.

To ascribe such a motive to appellants is unwarranted, particularly in view of the fact that the California courts have uniformly found that the purpose of the prevailing wage law, far from being a punitive one, is to foster the public welfare.

> "The overall purpose of the prevailing wage law . . . is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absences of job security and employment benefits enjoyed by public employees."

Lusardi Construction Co. v. Aubry (1992) 1 Cal. 4th 976, 987, 4 Cal. Rptr. 2d 847.

None of the opinions of the Ninth Circuit in this case referred to any evidence that suggests that in enforcing its contract the state was acting for any purpose other than that set forth in *Lusardi*, because, as noted, no such evidence exists. Not even G&G has argued that the state acted with the motive assigned by the court in issuing the notices to withhold. Certainly there was nothing before the majority from which it could have inferred that the state acted with a specific intent to impact G&G; it therefore had no factual basis upon which to draw such an inference.

The mere knowledge that an adverse impact on third parties is likely to follow from the enforcement of the law is clearly not enough to vitiate the reasoning in *O'Bannon*. Thus, the fact that the state had reason to know that the withholding from the prime contractor might impact G&G is no more significant than the fact that in *O'Bannon* the government had reason to know that the cessation of reimbursements to a medical facility would impact its patients; that the Department of Agriculture had reason to know that the closing of a store would impact the employees of the store [*Castaneda v. U.S. Department of Agriculture*, 807 F.2d 1478 (9th Cir. 1987)]; that the U.S.

Department of Education had reason to know that revoking student aid to a college would impact the students [*Grove City College v. Bell*, 687 F.2d 684, 704 (3rd Cir. 1982)]; or that the U.S. Department of Energy had reason to know that its offering of free storage facilities for nuclear waste would impact those in the business of providing such facilities. [*Nuclear Transport & Storage v. United States*, 890 F.2d 1348 (6th Cir. 1989)]. Yet the injured third parties suing in these cases, all of whom had as strong a claim as G&G has here, were held to be only indirectly affected by the government's action and, therefore, could state no due process claim.

The state has decided to conduct its business like every builder in the private sector by electing to contract and deal exclusively with the prime contractor. The decision of the Panel clearly flies in the face of the long judicially acknowledged right of a state to dictate the terms and conditions upon which public works will be performed by private contractors.

In *Atkin v. Kansas*, 191 U.S. 207, 24 S. Ct. 124 (1903), the Supreme Court upheld challenged Kansas legislation providing for maximum hours of work and requiring minimum rates of pay on public works projects. The Court stated:

> "It cannot be deemed a part of the liberty of any contractor that *he* be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. *On the contrary, it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities.* No court has authority to review its actions in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern." 191 U.S. at 222-223 (emphasis added).

In *Perkins v. Luekens Steel Co.*, 310 U.S. 113, 60 S. Ct. 869 (1940), an attack was made on the Public Contracts Act, a statute setting forth standards for those who deal with the federal government. This Court upheld the law, pointing out that '[l]ike private individuals and businesses, the government enjoys the unrestricted power to produce its own supplies, *to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.*" 310 U.S. at 127 (emphasis added).

Correctly viewed, the terms and conditions of the state's public works contracts merely empower it and its political subdivisions to do what every private proprietor in the marketplace does, deal on building projects with a single prime contractor who, in turn, has the direct responsibility for the companies and individuals it chooses to select as subcontractors on the project. This is a practice that has existed as long as there has been a building industry in this country. *See, e.g.*, discussion in Haggerty, *Real Estate Construction Current Problems* (Practicing Law Institute, 1973), p. 47, et seq. Business efficiency dictates that the owner (in this case the State) be permitted to look to and deal exclusively with the prime contractor, the only party with which it is in privity of contract, and to say that it holds the prime contractor accountable for all failures or defects in performance, whether they in fact be due to the fault of the prime contractor or one of its subcontractors.

As the cases cited *supra* declare, this is the State's right as a proprietor. This being the case, it cannot be fairly argued that the State's actions in this regard are tantamount to punishing or targeting those with whom it does not contract.

D. The Ninth Circuit's Decision Obliterates The Criteria Set Forth In *Sullivan* For Determining When Sufficient Property Interests Exist For Purposes Of Due Process

This Court in *Sullivan* further held that the workers compensation claimants in that case had no property right to a hearing because they had not made a showing of the basic elements of entitlement to the money withheld, *i.e.*, that the medical treatment in question was reasonable and necessary. Having failed to make such a showing, they were not entitled to any relief.

> "Respondents obviously have not cleared both of these hurdles. While they indeed have established their initial *eligibility* for medical treatment, they have yet to make good on their claim that the particular medical treatment they received was reasonable and necessary." 526 U.S. 40, 49.

It is apparent upon the most cursory analysis that G&G's claim in this case is subject to the same infirmity as the claims in *Sullivan*. It has never made any kind of a showing at any level that it was entitled to the funds withheld by its prime subcontractor. It has never, in fact, even alleged any entitlement to these funds (A-91). Clearly, under *Sullivan*, it has fallen far short of meeting its affirmative burden. Its failure to "clear" these essential "hurdles" in its pleadings must be assumed to lie in the fact that in actuality it can establish no valid claim on the merits.

The action G&G filed in the District Court sought only declaratory and injunctive relief on constitutional grounds for the failure of DLSE to grant a hearing prior to the issuance of the notices to withhold. Significantly, G&G did not seek recovery of the funds withheld. While G&G alleged in that action that the notices to withhold

were "wrongful" and "arbitrary and unreasonable,"[9] it has never alleged, and could never allege, either in the District Court or thereafter, that it was in compliance with the prevailing wage law requirements and had therefore met all of the conditions entitling it to payment in full. There is not even an allegation in the First Amended Complaint that all contractual conditions precedent to receipt of the funds (*i.e.*, full performance of the terms of the contract) were satisfied. Instead, G&G took the simplistic position, contrary to the express reasoning of *Sullivan*, that the withholding without a hearing in and of itself necessarily constituted a deprivation of due process, regardless of the validity of G&G's claims on the merits. This contention is contrary to law and to well-established legal precedents existing prior to *Sullivan*.

G&G's allegations of entitlement to these withheld funds are accordingly clearly lacking. As this Court stated years ago in *Board of Regents v. Roth, supra*, 408 U.S. 564, 577, 92 S. Ct. 2701 (1972) in considering the nature of property interests for purposes of due process:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."

What is clearly missing in G&G's pleadings is the statement of "a legitimate claim of entitlement" to the funds withheld. Without such threshold allegations, G&G cannot be heard to argue that it is entitled to relief in either this Court or the district court.

Judges Hawkins and Reinhardt elected not to address this fundamental failing on G&G's part. (A-6). They simply glossed over the fact that G&G, having failed to set forth its entitlement to the funds by not alleging it had

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[9] It is well-settled that such conclusionary allegations are insufficient to defeat a motion to dismiss for failure to state a claim. *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996); *Anderson v. Clow*, 89 F.3d 1399, 1403 (9th Cir. 1996).

performed all the terms of its contract, had not stated a claim upon which any relief could be granted.

Judge Kozinki's learned dissent, on the other hand, points out that "G&G can have no property interest in being paid for work that has not been shown to satisfy the contractual conditions that it be completed in accordance with the prevailing wage requirements." (A-11).

G&G must be made, like any other litigant, to stand or fall on the sufficiency of its pleadings, pleadings in this instance that omitted essential allegations necessary to maintain its due process claims. As the Ninth Circuit has observed in comparable circumstances, "[a] complaint is not a puzzle, however, and we are loathe to allow plaintiffs to tax defendants, against whom they have leveled very serious charges, with the burden of solving puzzles in addition to the burden of formulating an answer to their complaint." *In re Glenfed, Inc. Securities Litigation*, 42 F.3d 1541, 1554 (9th Circ. 1994).[10]

Having failed to address, let alone prove at any stage of the administrative or judicial proceedings, its entitlement to the funds withheld by its prime contractor, G&G cannot be heard to suddenly argue at this juncture, in view of the manifest teachings of *Sullivan*, that it had a property right for due process purposes to a hearing in this case.

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[10] Conclusionary allegations are insufficient to defeat a motion to dismiss for failure to state a claim. *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996); *Anderson v. Clow*, 89 F.3d 1399, 1403 (9th Cir. 1996).

CONCLUSION

For the reasons stated above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

G & G FIRE SPRINKLERS, INC.,

Plaintiff-Appellee,

v.

VICTORIA L. BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual in her capacity as Deputy Labor Commissioner of the State of California,

Defendants-Appellants.

No. 95-56639
D.C. No.
CV-95-04839-MLR

G & G FIRE SPRINKLERS, INC.,

Plaintiff-Appellee,

v.

VICTORIA L. BRADSHAW, an individual in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California,

Defendants-Appellants.

No. 96-55194

D.C. No.
CV-95-04839-MLR

ORDER

On Remand from the United States Supreme Court
April 19, 1999.

Argued and Submitted
September 14, 1999 – Pasadena, California

Filed Feb. 23, 2000.

Before: Stephen Reinhardt, Alex Kozinski and Michael Daly Hawkins, Circuit Judges.

Order; Dissent by Judge Kozinski.

ORDER

In *G & G Fire Sprinklers, Inc. v. Bradshaw*, 156 F.3d 893 (9th Cir. 1998), we held that California Labor Code provisions authorizing the state to seize money and impose penalties for a subcontractor's failure to comply with prevailing wage requirements violated the Due Process Clause of the Fourteenth Amendment. *See id.* at 904. The Supreme Court granted certiorari, vacated our judgment, and remanded "for further consideration in light of *American Manufacturers Mutual Insurance Company v. Sullivan*, 119 S.Ct. 977, (1999)." *Bradshaw v. G & G Fire Sprinklers, Inc.*, 119 S.Ct. 1450 (1999). Having determined that *Sullivan* is fully consistent with our analysis, we reinstate the judgment and opinion.

DISCUSSION

Sullivan involved the Pennsylvania Workers' Compensation Act, under which an employer or its insurer must pay for all "reasonable" and "necessary" medical treatment for work-related injuries. *See* 119 S.Ct. at 982. Under the Pennsylvania scheme, an insurance company

could withhold payment for medical treatment if it disputed the reasonableness or necessity of that treatment. *See* Pa. Stat. Ann. § 531(5) ("All payments to providers for treatment . . . shall be made within thirty (30) days of receipt of such bills and records unless the employer or insurer disputes the reasonableness or necessity of the treatment."). The *Sullivan* plaintiffs claimed that the failure to pay their contested benefit claims within thirty days, before a process was provided to resolve the dispute about the "reasonableness" of their treatment, amounted to a deprivation of due process.

Sullivan dealt with two questions: (1) whether the insurance company's decision to withhold payment for disputed medical treatment was fairly attributable to the State so as to subject insurers to the constraints of the Fourteenth Amendment, 119 S.Ct. at 984; and (2) whether the Due Process Clause requires workers' compensation insurers to immediately pay disputed medical bills prior to a determination that the medical treatment was reasonable and necessary. *Id.* at 985.

The first question concerns whether there is state action, since the Fourteenth Amendment does not reach private acts or actors. *Sullivan* repeats a familiar calculus to determine the presence of state action: there must be some deprivation of a constitutional right and the party charged with the deprivation must be fairly said to be a state actor. *Id.* at 986. The second question turns on whether the claimant has a property interest in the matter complained of.

The Supreme Court found that the *Sullivan* plaintiffs did not possess a property interest in the *immediate,*

unconditional payment for all medical treatment under the Pennsylvania statute. Nevertheless, the Court stated that the plaintiffs did have an interest in payment of "reasonable" medical costs, *see Sullivan,* 119 S.Ct. at 990, and went out of its way to make clear that its holding did not upset previous Supreme Court precedent supporting the conclusion that the plaintiffs had a property interest in their *claims* for payment. *See id.* at n.13 ("Respondents do not contend that they have a property interest in their claims for payment, as distinct from the payments themselves, such that the State, the arguments goes, could not finally reject their claims without affording them appropriate procedural protections.") (citing *Logan v. Zimmerman Brush Co.,* 45 U.S. 422, 430-31 (1982)). Justice Ginsburg, who provided the fifth vote necessary to make the due process discussion in *Sullivan* an opinion of the Court, further clarified this distinction in her concurrence:

> I join Part III of the Court's opinion on the understanding that the Court rejects specifically, and only, respondent's demands for constant payment of each medical bill, within 30 days of receipt, *pending determination of the necessity or reasonableness of the medical treatment.* I do not doubt, however, that due process requires fair procedures for the adjudication of respondents' claims for workers' compensation benefits, including medical care.

Sullivan, 119 S.Ct. at 991 (emphasis added) (citation omitted).

Our opinion adopts the approach explicitly preserved by the *Sullivan* majority and unequivocally

adopted in Justice Ginsburg's concurrence. We specifically held that G & G did not have a right to payment of the disputed funds pending the outcome of whatever kind of hearing would be afforded to determine whether G & G complied with the California prevailing wage laws. *See G & G Fire Sprinklers*, 156 F.3d at 903-04. To the contrary, we explicitly authorized the withholding of payments pending the hearing. *See id.* G & G's due process rights were violated, we held, not because it was denied immediate payment, but because the California statutory scheme afforded no hearing at all when state officials directed that payments be withheld.[1] *See id.* at 904. Nor can there be any doubt whether the action at issue here was compelled by the State. The withholding in *Sullivan* was carried out by a private insurer exercising its discretion in a way permitted by State law. The withholding here was specifically directed by State officials in

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[1] It is true that our opinion addressed the withholding of payments pending the outcome of the hearing to determine contractor compliance in its discussion of the "process due" to a protected property interest, and not in its discussion of the nature of the property interest protected. In contrast, the above discussion in *Sullivan* is situated in the Supreme Court's discussion of the existence or nonexistence of a protected property interest. But this does not reduce the relevance of *Sullivan's* reasoning. As the Court recognized in the seminal due process case *Mathews v. Eldridge*, the definition of a protected property interest often includes a temporal component. *See* 424 U.S. 319 (1976) (identifying the property interest at stake as the beneficiary's interest in continuing to receive benefits for approximately one year). For this reason, issues of timing can arise at either the property-determination or the process-determination stage.

an environment where the withholding party has no discretion at all. Moreover, in their complaint the plaintiffs directly attack the notices of withholding issued by the state agency, alleging that they were issued "arbitrarily and unreasonably."

Because our holding is not contrary to the Court's ruling in *Sullivan*, and because our opinion's reasoning fits comfortably within the analytic framework set forth in *Sullivan*, we REINSTATE the judgment and the opinion reported at 156 F.3d 893 (9th Cir. 1998).

KOZINSKI, Circuit Judge, dissenting:

I dissented from the original opinion in this case because I do not believe that relations among contracting parties are governed by the Due Process Clause merely because one of the parties happens to be a state. *See G & G Fire Sprinklers, Inc. v. Bradshaw*, 156 F.3d 893, 908 (1998) (Kozinski, J., dissenting). I continue to adhere to that view. But the Supreme Court has now directed us to reconsider our opinion in light of *American Mfrs. Mut. Ins. Co. v. Sullivan*, 119 S.Ct. 977 (1999). *See Bradshaw v. G & G Fire Sprinklers, Inc.*, 119 S.Ct. 1450 (1999). In response, the majority reinstates its original opinion without amendment, claiming that its reasoning "fits comfortably within the analytic framework set forth in *Sullivan*." Reinstatement Order at 1970. I must dissent once again, because *Sullivan* fits the majority's rationale about as comfortably as Cinderella's slipper on the wicked step-sister's foot.

Sullivan teaches that, to state a claim for relief under section 1983, G & G must identify both an alleged constitutional deprivation and a state actor who is responsible for it. *See Sullivan*, 119 S.Ct. at 985 (rejecting the argument that "we need not concern ourselves with 'the identity of the defendant' "). In deciding whether G & G has succeeded in this, *Sullivan* explains that we must begin "by identifying 'the specific conduct of which the plaintiff complains.' " *Id.* at 985 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). Here the only deprivation alleged by G & G was effected by the prime contractor, who withheld funds which G & G claims under a contract.[1] There's no state action.

The majority waves a magic wand by asserting that "[t]he withholding here was specifically directed by state officials in an environment where the withholding party has no discretion at all." Reinstatement Order at 1970. This would be true had the prime contractor been ordered, under penalty of law, to withhold funds from G & G. It was not. The only entity "specifically directed" to withhold funds was the awarding body, which withheld funds only from the prime contractor, not from G & G. While the challenged provision *authorized* – even *encouraged* – the prime to withhold an equivalent amount from G & G, the prime was free to pay G & G the full amount specified by the contract. *Sullivan* clearly holds that mere authorization and encouragement do not render a private entity's decisions "fairly attributable" to the state. 119

[1] *See G & G*, 156 F.3d at 901 n. 4 ("Here, G & G was not paid by its respective principal obligor, the prime contractor, and it is asking for an opportunity to contest that deprivation.")

S.Ct. at 986. Under *Sullivan*, then, the prime contractor who chose to deprive G & G of its alleged property was not a state actor.

This presents the same problem for G & G as it did for the plaintiffs in *Sullivan*. The Court's description of the *Sullivan* plaintiffs' attempt to get around this problem is equally apt here: "Perhaps hoping to avoid the traditional application of our state-action cases, respondents attempt to characterize their claim as a 'facial' or 'direct' challenge to the [provisions in question.]" *Id.* at 985. In like manner, G & G's claim comes to us in the garb of a "direct constitutional challenge to the state's regulatory power as embodied in these statutes. . . . " G & G, 156 F.3d at 902. The reinstated opinion assumes that, so long as standing requirements are satisfied, G & G may bring such a challenge. It then goes on to find a "causal link between G & G's injury and the state's action" sufficient to support standing. *Id.* at 900.

The problem is that standing deals only with whether the plaintiff "is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." *Flast v. Cohen*, 392 U.S. 83, 100 (1968). If the state's conduct does not violate the Constitution, there can be no question of standing – standing to challenge *what*? The violation alleged here is an unconstitutional deprivation of property. *Sullivan* tells us that the deprivation at issue cannot be attributed to the state. Therefore, the state cannot have violated G & G's right to due process. G & G is left with two alternatives: suing a depriver who is not a state actor, or suing a state actor who has committed no deprivation. The panel's opinion lets G & G get away with the latter, by substituting the

normal causation prong of standing analysis for the more intimate causal relationship required by the state action doctrine.[2] Were it permissible to thus turn a pumpkin into a carriage, the Court should have allowed the *Sullivan* plaintiffs to bring their "facial challenge," on the theory that, while the private insurers in that case were not state actors, the state bureau's authorization of their withholding created a "causal link" sufficient to support standing.[3]

In addition to ignoring *Sullivan's* state action holding, the majority fails to apply the other teaching of the case-that before finding a deprivation, we must carefully identify the nature of the property interest at stake. *See Sullivan*, 119 S.Ct. at 989-90 (holding that a statutory entitlement to payment for "reasonable" and "necessary" medical treatment cannot give rise to a property interest

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[2] *Compare G & G*, 156 F.3d at 899-900 (causation requirement for standing satisfied where choices of third party have been made " 'in such a manner as to produce causation and permit redressability' ") (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992)), *with Sullivan*, 119 S.Ct. at 986 (no state action unless the state has " 'exercised coercive power' " or provided such significant encouragement that " 'the choice must in law be deemed to be that of the State' ") (quoting *Blum*, 457 U.S. at 1004).

[3] Like G & G, the *Sullivan* plaintiffs had also named as defendants the state officials who administered the challenged act. *See Sullivan*, 119 S.Ct. at 984. Yet after holding that the private insurers regulated by the act were not state actors, the Court held that this alone would be sufficient to reverse the Third Circuit's holding that the act violated due process. *See id.* at 989. The Court nevertheless went on to address the merits of the claim, because it thought the question an important one. *See id.*

until the payments in question have been proven to be reasonable and necessary). The opinion reinstated today asserts that G & G has a protectable property interest "in being paid in full for the construction work it has completed." *G & G*, 156 F.3d at 901. This cannot be so, for just as the *Sullivan* plaintiffs had no property interest in receiving payment for medical treatments that had not been shown to be "reasonable" and "necessary," G & G can have no property interest in being paid for work that has not been shown to satisfy the contractual condition that it be completed in accordance with prevailing wage requirements. Nevertheless, though the majority now attempts to recharacterize its position, *see* Reinstatement Order at 1969, its opinion remains unambiguous in holding that G & G has *already suffered* a deprivation for which the state is required to provide a post-deprivation hearing. *See G & G*, 156 F.3d at 903-04.

Even if the reinstated opinion actually rested on the rationale now attributed to it, we would still have a case of premature remediation. The majority's current position is that its holding is in line with previous Supreme Court precedent protecting plaintiffs' "property interest in their *claims* for payment." Reinstatement Order at 1968. If the property interest at stake here is G & G's *claim* for payment, however, when and how G & G was deprived of it? This is not a case like *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), where the plaintiff had filed a timely claim that was dismissed because of a procedural default committed by the state. *See id.* at 426-27. G & G has yet to attempt to file a claim in state court. How can the state

have deprived G & G of a legal claim it has never asked the state to enforce?

The reinstated opinion forces the state to create an entirely new administrative machinery if it wishes to withhold funds in accordance with the terms of its contract. *See G & G*, 156 F.3d at 905-06. The majority appears to believe this is justified by Justice Ginsburg's concurring statement in *Sullivan* that " 'due process requires fair procedures for the adjudication [of claims.]' " Reinstatement Order at 1969 (quoting *Sullivan*, 119 S.Ct. at 991 (Ginsburg, J., concurring)). No doubt it does. But this is not a case like *Goldberg v. Kelly*, 397 U.S. 254 (1970), where the Court, having identified a previously unrecognized property interest in welfare benefits, was obliged to create a new procedural regime to protect it. This is a claim for payment on a contract. There is a well-established "fair procedure" for dealing with such claims: an action for breach of contract in state court. It seems unlikely that Justice Ginsburg would regard such a time-honored procedure as inadequate to satisfy the demands of due process. The majority has not explained why working on a government contract heightens one's interest in receiving prompt payment so as to require procedural safeguards not available to other parties that have a disputed claim under a contract.

It is true that the law does not on its face guarantee that a subcontractor will attain an assignment enabling it to sue the awarding body. But G & G has not tried to

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[4] *Cf. Sullivan*, 119 S.Ct. at 988 (noting that the legal obligation to pay on a contract arises only after one has "initiated a claim and reduced it to a judgment").

obtain such an assignment from the prime contractor, nor has it given the state courts a chance to decide whether a subcontractor who has been denied such assignment nevertheless has an equitable right to sue under state law. Until these questions have been resolved against G & G, it simply cannot be said that the state has " 'finally reject[ed] their claims without affording them appropriate procedural protections.' " Reinstatement Order at 1968 (quoting *Sullivan*, 119 S.Ct. at 990 n.13).

To sum up, the reinstated opinion papers over a state action deficiency with standing analysis, identifies a property interest the Court has told us can't yet exist, and holds that due process entitles G & G to the creation of a new procedure bypassing the one all other unpaid contractors are required to use. A fairy godmother could do no more. Once again, I must respectfully dissent.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

G & G FIRE SPRINKLERS, INC.,

Plaintiff-Appellee,

v.

VICTORIA L. BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., Director; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual in her capacity as Deputy Labor Commissioner of the State of California,

Defendants-Appellants.

No. 95-56639

D.C. No.
CV-95-04839-MLR

ORDER AND
AMENDED
OPINION

G & G FIRE SPRINKLERS, INC.,

Plaintiff-Appellee,

v.

VICTORIA L. BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California,

Defendants-Appellants.

No. 96-55194

D.C. No.
CV-95-04839-R

Appeals from the United States District Court
for the Central District of California
Manuel L. Real, Chief District Judge, Presiding

No. 95-56639
Argued and Submitted
May 7, 1996 – Pasadena, California

No. 96-55194
Submitted August 27, 1997*
Pasadena, California

Filed February 3, 1998
Amended September 10, 1998

Before: Stephen Reinhardt, Alex Kozinski and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Hawkins; Dissent by Judge Kozinski

COUNSEL

Thomas S. Kerrigan, State of California Department of Industrial Relations, Los Angeles, California for the defendants-appellants.

Stephen A. Seideman, Levin, Stein, Chyten & Schneider, Los Angeles, California, for the plaintiff-appellee in No. 95-56639.

Thomas J. McDermott and Harvey Rochman, Manatt, Phelps & Phillips, Los Angeles, California, for the plaintiff-appellee in No. 96-55194.

William P. Gemmill, Gascou, Gemmill & Thornton, Los Angeles, California, for the plaintiff-appellee on rehearing.

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*The panel finds this case appropriate for submission without argument pursuant to Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

Scott A. Kronland, Altshuler, Berzon, Nussbaum, Berzon & Rubin, San Francisco, California, for the amici curiae on rehearing.

ORDER

The Opinion filed on February 3, 1998, and appearing at 136 F.3d 587 (9th Cir. 1998), is amended as follows:

(1) Page 591, second column – the counsel listing is revised as follows:

Thomas S. Kerrigan, State of California Department of Industrial Relations, Los Angeles, California for the defendants-appellants.

Stephen A. Seideman, Levin, Stein, Chyten & Schneider, Los Angeles, California, for the plaintiff-appellee in No. 95-56639.

Thomas J. McDermott and Harvey Rochman, Manatt, Phelps & Phillips, Los Angeles, California, for the plaintiff-appellee in No. 96-55194.

William P. Gemmill, Gascou, Gemmill & Thornton, Los Angeles, California, for the plaintiff-appellee on rehearing.

Scott A. Kronland, Altshuler, Berzon, Nussbaum, Berzon & Rubin, San Francisco, California, for the amici curiae on rehearing.

(2) Page 596, first column, lines 29-31 – revise sentence to read "This case thus involves a direct constitutional challenge to the state's regulatory power as embodied in these statutes, not a mere contractual dispute."

(3) Page 597, second column, between the first full paragraph and the second full paragraph – insert:

> Here, we have no doubt that the state's interest in ensuring the payment of prevailing wages is sufficiently "important," *see Mallen*, 486 U.S. at 240, to justify the withholding of funds pending the outcome of whatever kind of hearing may be afforded. Whether a hearing is before or after the giving of notice or the actual withholding is a matter for the state to determine on the basis of the practical considerations involved. *See, e.g., Gilbert v. Homar*, 117 S. Ct. 1807, 1812 (1997) (citing *Morissey v. Brewer*, 408 U.S. 471, 481 (1972)).

(4) Page 597, second column, second full paragraph, line 1 – insert "however," between "case," and "subcontractors"

(5) Page 598, first column, first paragraph – delete paragraph beginning "What specific type of process" and ending "payments and assessing penalties.10" and substitute in its place:

> Although the decision as to which specific type of hearing will be afforded subcontractors may depend upon the factual circumstances, the state must, upon determining that a subcontractor has failed to pay prevailing wages, provide the contractor with a reasonably prompt hearing of some sort.[10] Pending the outcome of such a hearing, the state may withhold payments and penalty funds.[11]

The corresponding footnotes are as follows:

> [10] The question of when a post-deprivation hearing is adequate is separate from the question of what constitutes a sufficient post-deprivation procedure. The Supreme Court has made it clear that no single model is required in all cases, but that the nature of the deprivation and the other underlying circumstances dictate how much process is due. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982) (citing *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19 (1978); *Goss v. Lopez*, 419 U.S. 565, 579 (1975)).
>
> [11] Contrary to the state's concerns, our decision today does not affect the validity of the Davis-Bacon Act, 40 U.S.C. §§ 276a *et seq.*, upon which the California law was patterned, because the Davis-Bacon Act provides for an extensive hearing and appeal structure through its implementing regulations. Within 30 days after a withholding, either the prime contractor or the subcontractor may request an administrative hearing to review the findings of the Administrator of the Wage and Hour Division of the Department of Labor. 29 C.F.R. § 5.11. The findings and rulings of the administrator may be appealed to an administrative law judge ("ALJ"), whose decision may be appealed to the Wage Appeals Board. *Id.* Ultimately, the Board's decision may be appealed to the federal court. 5 U.S.C. § 704.

(6) Page 598, footnote 9, second paragraph – delete paragraph beginning "Moreover, even if *Parratt* and *Hudson* were" and ending "have no such independent right" and substitute in its place:

Moreover, we doubt the viability of a subcontractor's hypothetical suit against a prime contractor based on theories of breach of the covenant of good faith and fair dealing or equitable subrogation. The state and amici curiae have been unable to cite a single California case utilizing either theory in this context. The prime contractor could easily defeat any breach of covenant suit by demonstrating that its withholding of payment was authorized by law. *See* § 1729. And the facts of this case clearly do not meet the traditional elements of equitable subrogation. *See Caito v. United California Bank*, 576 P.2d 466, 471 (Cal. 1978).

OPINION

HAWKINS, Circuit Judge:

This case requires us to decide whether certain California Labor Code provisions, authorizing the state to seize money and impose penalties for a subcontractor's failure to comply with prevailing wage requirements, violate the Due Process Clause of the Fourteenth Amendment because no notice or hearing is required before such adverse action is taken. Specifically, Victoria L. Bradshaw, Labor Commissioner of the State of California, and others appeal the district court's order granting summary judgment in favor of G & G Fire Sprinklers, Inc. ("G & G"), the public works subcontractor here, and permanently enjoining Bradshaw from enforcing California Labor Code §§ 1727, 1730-33, 1775, 1776(g) and 1813 against G & G for alleged violations of California prevailing wage laws. We hold that G & G has standing to maintain this action and that due process requires either a pre- or post-

deprivation hearing, but that the district court's injunction should be narrowed to apply only until such time as the state may adopt by regulation or otherwise appropriate procedures affording such hearings.

I. Facts

A. *The Parties*

Appellee G & G is a fire protection company that installs fire sprinkler systems. G & G has performed numerous public works projects as a contractor or subcontractor. Appellants are the California Division of Labor Standards Enforcement ("DLSE"), Department of Industrial Relations, and officials thereof (collectively "the state").

B. *The California Labor Code*

The California Labor Code requires contractors and subcontractors on public works projects to pay a state-determined prevailing wage to all their workers. Cal. Lab. Code § 1771. To enforce this requirement, the body awarding the contract ("the awarding body") is allowed to withhold funds from a prime contractor should it determine that the contractor or one of its subcontractors has violated the prevailing wage law. § 1727. The state is authorized to withhold an amount equal to the total amount that all the workers have been underpaid, as well as up to $50 per day, per worker in fines for each instance in which the contractor fails to pay the prevailing wage. § 1775. A withholding order can only be issued after a full investigation by DLSE or the awarding body, unless

the withholding is from the final payment to be made to the prime contractor. § 1727. If the violator is a subcontractor, the prime contractor is authorized to withhold an equivalent amount from its payments to the subcontractor. § 1729. All of these provisions must be incorporated into all public works contracts. Cal. Admin. Code, Title 8, § 16430.

A notice to withhold to an awarding body is a standard procedure utilized by DLSE, but no notice or hearing is required prior to its issuance. DLSE is not required to produce any evidence of a violation of the law, no specific standard is applied in determining whether to issue a notice to withhold, and no procedure exists to guard against the issuance of improper or excessive notices to withhold. Moreover, while DLSE has no formal procedures for conducting investigations, as a general rule, information from a witness/informant must be verified with an independent source. In addition, recommendations to withhold must be reviewed by a supervisor.

The exclusive remedy after withholding is a lawsuit by the prime contractor against the awarding body for recovery of the money withheld. §§ 1730-33. Such a suit must be filed within 90 days of the withholding, and the contractor bears the burden of establishing that there was no violation. § 1733. DLSE may defend the lawsuit upon request by the awarding body. *Id.* Subcontractors are not given the right to bring suit, although a prime contractor is allowed to assign its right to sue. *Id.* If a suit is not brought within 90 days, the state disburses the withheld funds to the underpaid workers; if a suit is brought within this period, then the money is held in escrow until its resolution. § 1731.

C. *The Dispute*

This case arose when DLSE issued three withholding notices against G & G for a total of at least $120,000. The notices were for three separate projects on which G & G had served as a subcontractor.[1] The awarding bodies for each of the projects have withheld money from the prime contractors, who in turn have withheld payment from G & G. No evidence in the record explains in detail the basis for the state's decision to withhold funds from G & G.

The issuance of the notices to withhold has a substantial detrimental effect on G & G's ability to do business, as their effect is to reduce, or cut off, payments for work performed and to damage G & G's reputation in the industry. Inasmuch as G & G intends to perform further public works projects in the future, the issuance of additional improper notices to withhold also could impair G & G's cash flow and ability to do business.

G & G filed this action for declaratory and injunctive relief, claiming that the issuance of the notices to withhold without a prior hearing constitutes a deprivation of property without due process of law in violation of the Fourteenth Amendment. The state responded with a motion to dismiss, and G & G later filed a motion for summary judgment. The district court granted G & G's motion for summary judgment and denied the state's motion to dismiss. The district court's judgment declares

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[1] Withholding notices had also been issued on projects on which G & G had served as the prime contractor, but those notices were withdrawn before this suit ensued.

sections 1727, 1730-33, 1775, 1776(g) and 1813 of the California Labor Code and the state's practices thereunder unconstitutional and enjoins the state from enforcing these sections against G & G.

II. Standing

We first address whether G & G has standing to maintain this action.[2] The state argues G & G does not have standing because subcontractors lack privity of contract with the state under the Labor Code and because the state withheld monies from the prime contractors, not G & G, thus precluding any direct causal connection between G & G's alleged injury and the state's conduct.

Standing is a question of law that we review de novo. *Sahni v. American Diversified Partners*, 83 F.3d 1054, 1056 (9th Cir. 1996). To establish standing, a federal plaintiff must show (1) an injury in fact; (2) a causal connection

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[2] We note at the outset that whether a party has standing is a separate question from whether a party has an interest protected by the Due Process Clause – here, a property interest. "Standing to bring a state court claim of deprivation of property rights does not establish a protected property interest." *Kim Constr. Co. v. Board of Trustees*, 14 F.3d 1243, 1249 (7th Cir. 1994). Moreover, that a party has no constitutionally protected property interest under a statute does not mean that it has no standing to bring a claim under that statute. *See id.*

Accordingly, cases such as *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773 (1980), and *San Bernardino Physicians' Servs. Med. Group, Inc. v. County of San Bernardino*, 825 F.2d 1404 (9th Cir. 1987), which the state cites to argue that G & G has no standing, are inapposite because they address whether parties have protectible property interests, not standing.

between the injury and the conduct complained of; and (3) that it is likely, as opposed to speculative, that the injury will be redressed by favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

To establish injury in fact, a plaintiff must demonstrate that the injury is "concrete and particularized" and that it is "actual or imminent, not conjectural or hypothetical." *Id.* at 560. The injury here is both concrete and actual. As a result of the state's withholding procedures, G & G has not been paid approximately $120,000, to which it claims it is entitled. G & G meets the first requirement for standing.

A plaintiff must also show that the injury "fairly can be traced to the challenged action of the defendant" and that it does not result "from the independent action of some third party not before the court." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). The Supreme Court detailed the methodology to be followed in determining causation in a case of this type:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of the facts that must be averred (at the summary judgment stage) . . . in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment . . . will redress it. When . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability

> ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction . . . it becomes the burden of the plaintiff to adduce facts showing that those choices [of the third party] have been or will be made in such manner as to produce causation and permit redressability of injury.

Lujan, 504 U.S. at 561-62 (emphasis in original).

The state contends that G & G cannot establish causation because this case involves the state's regulation of a third party, the prime contractors, whose own independent choices are an intervening cause of G & G's injury. Specifically, the state cites California Labor Code § 1729, which states that "[i]t shall be *lawful* for any contractor to withhold from any subcontractor under him sufficient sums to cover any penalties withheld from him" (emphasis added), in support of its argument that the prime contractors were not required to withhold money from G & G and that their decision to do so was the true cause of G & G's injury.

This argument elevates form over substance. The state's action here is targeted at G & G; the prime contractors' only role in the dispute is that of a conduit, not some third party whose independent choices caused G & G's injury. The state investigated *G & G*'s conduct, not the prime contractors', and the withholding notices explicitly named G & G as the violator of the California Labor Code. G & G was clearly the "object of the action" as the Supreme Court used the term. As such, the state's conduct is the cause of G & G's injury: the money would not

have been withheld but for the state's actions.[3] That was the intended result of the state's action, in accordance with the overarching purpose of its regulatory scheme to ensure that prime contractors and subcontractors pay their workers the state-determined prevailing wage.

Even if we somehow assume that G & G is not itself the object of the action, but is indirectly affected by the state's regulation of the prime contractors, our conclusion would be the same. That the harm to G & G may have resulted indirectly does not in itself preclude standing. As the Supreme Court stated in *Warth v. Seldin*, 422 U.S. at 505:

> When a governmental prohibition or restriction imposed on one party causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights.

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[3] This case differs from those in which the Supreme Court has found the requisite "but for" causation lacking. *See, e.g., Asarco, Inc. v. Kadish*, 490 U.S. 605 (1989) (individual taxpayers and teachers' organization lacked standing to challenge Arizona land management statute when only alleged injuries were increased taxes and reduced school funding because of impossibility of showing statute had direct causal impact on taxes or school funding); *Simon*, 426 U.S. at 26 (plaintiffs lacked standing to sue due to inability to establish causal relationship between IRS ruling and hospitals' decisions not to provide treatment); *Warth v. Seldin*, 422 U.S. 490 (1975) (plaintiffs asserting inability to find homes in city based on exclusionary zoning practices failed to establish causation).

Furthermore, G & G can show that the prime contractors' (third party) choices "have been or will be made in such a manner as to produce causation and permit redressability of injury." *Lujan*, 504 U.S. at 562. Here, the prime contractors have withheld payment from G & G, completing the causal link between G & G's injury and the state's action and permitting redressability. Accordingly, G & G's injury can be directly traced to the state's conduct and the second requirement for standing is also satisfied.

To meet the third requirement for standing, a plaintiff must show that his injury will be redressed if he prevails in his legal action. In this case, G & G's injury will be redressed by this suit because if G & G prevails, the withheld money will be released to the prime contractors, who will be obligated by contract to pay it to G & G.

That G & G as a subcontractor lacks privity of contract with the state only bolsters our conclusion. Under California's Labor Code, subcontractors cannot sue the state for withholding funds; only prime contractors can. A subcontractor theoretically could sue the prime contractor, but the latter has a defense of withholding the funds pursuant to state law. In addition, the Labor Code does not grant subcontractors the right to any type of hearing to contest a withholding. Therefore, if a prime contractor chooses not to contest a withholding or to assign its rights to sue to the subcontractor, the subcontractor is left holding a quite empty bag.[4]

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[4] The state cites *Lloyd v. Stewart & Nuss, Inc.*, 327 F.2d 642, 645-46 (9th Cir. 1964), for the proposition that a subcontractor has no property right to funds withheld by an awarding body and hence has no standing to challenge such a withholding. We reject this argument for several reasons.

First, *Lloyd* is a bankruptcy case holding that amounts withheld from a prime contractor by the state upon request of a trucking service doing work for a subcontractor did not constitute property owned or possessed by the debtor subcontractor and hence the bankruptcy court had no summary jurisdiction over the property. The case does not even involve constitutional issues, let alone due process concerns, and it never discusses standing. Second, even if we were to deem *Lloyd* remotely relevant to this case, its decision that the subcontractor debtor had no property right in the debt owed to the prime contractor by the state sheds no light on whether a subcontractor has a protectible property interest in wages withheld from it pursuant to state law. In fact, *Lloyd* acknowledges that the subcontractor and the trucking service "both possessed the right to claim against the fund, but only in the event they were not paid by their respective principal obligors." *Id.* at 646. Here, G & G was not paid by its respective principal obligor, the prime contractor, and it is asking for an opportunity to contest that deprivation.

G & G has standing to maintain this suit.

III. Due Process Claim

A due process claim has two elements: (1) a deprivation of a protectible interest, and (2) denial of adequate procedural protections. *See Goldberg v. Kelly*, 397 U.S. 254 (1970). We consider each of these elements in turn.

A. *Protectible Interest*

To determine whether G & G has suffered a deprivation of a protectible interest, we must evaluate (1) what type of interest has been deprived, and (2) whether that

interest is protected by the Due Process Clause. *Board of Regents of State Colleges v. Roth*, 408 U.S. 569-70 (1972). G & G's interest arises from its public works contract; it has a property interest in being paid in full for the construction work it has completed. *See Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342 (1969) (holding that Wisconsin's garnishment procedure allowing wages to be frozen upon request of creditor's lawyer constituted "obvious" deprivation of property). The state's withholding of over $120,000 has deprived G & G of its interest in full payment for services rendered.

The state quite properly notes, however, that not all property interests are protected by the Due Process Clause. While both federal and California law recognize that a contract with the state can create a constitutionally protected property interest, *Perry v. Sindermann*, 408 U.S. 593, 601 (1972); *Walker v. Northern San Diego County Hosp. Dist.*, 185 Cal. Rptr. 617, 620 (1982), not all public contracts give rise to a protectible due process interest. *See San Bernardino Physicians' Servs. Med. Group, Inc.*, 825 F.2d at 1408. Indeed, because any breach of contract claim against the state logically can be construed as a due process claim, " 'we must bear in mind that the Fourteenth Amendment was not intended to shift the whole of the public law of the states into the federal courts.' " *Id.* (quoting *Brown v. Brienen*, 722 F.2d 360, 364 (7th Cir. 1983)).

> Even though every contract may confer some legal rights under state law, that fact alone need not place all contracts within federal due process protection. Although the underlying substantive interest is created by an independent source such as state law, federal constitutional law determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause.

Id. at 1408-09 (internal quotations omitted).

Drawing on these principles, the state asserts that because the withholding procedure at issue is contained in G & G's contract, this case is nothing more than a contractual dispute that does not rise to the level of a constitutional claim. Moreover, the state argues that construing this case to present a constitutional claim would result in the "federalization" of state contract law by giving G & G and all others who contract with the state an opportunity to have their grievances reviewed in federal court when they should be confined to their contractually bargained-for remedies under state law. This argument, however, misses the mark. Unlike the cases cited by the state, this case does not involve a breach of contract claim or a challenge to the contract itself.[5] G & G

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[5] All the cases cited by the state to support its argument that G & G's interest is not constitutionally protected involve due process claims arising from an alleged breach of contract. *See, e.g., Unger v. National Residents Matching Program*, 928 F.2d 1392, 1399 (3d Cir. 1991) (termination of residency program after plaintiff's acceptance into program failed to implicate due process rights because contract with university hospital did not confer protected status and did not include provision of for-cause termination only); *S & D Maintenance Co. v. Goldin*, 844 F.2d 962, 968-69 (2d Cir. 1988) (contractor alleging state breached contract by withholding funds pending result of criminal investigation failed to establish due process claim because neither contract nor state law contained for-cause termination provision or right to prompt payment); *San*

concedes that the express terms of the contract grant the state the authority to withhold funds for wage violations; the withholding is not a breach of contract.[6] Instead, G & G challenges the constitutionality of several provisions of the California Labor Code as violative of its federal due process rights.[7] Those provisions, incorporated by state law into all public works contracts, authorize the state to withhold payment of money owed to contractors or subcontractors for alleged violations of the state prevailing wage law. This case thus involves a direct constitutional challenge to the state's regulatory power as embodied in these statutes, not a mere contractual dispute.

The state, relying on *O'Bannon*, 447 U.S. at 773, also contends that G & G's property interest is not protectible because this case involves the indirect effects of state action. In *O'Bannon*, the Supreme Court reiterated the principle that "the due process provision of the Fifth Amendment does not apply to the indirect adverse effects

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Bernardino Physicians' Servs. Med. Group, Inc., 825 F.2d at 1406 (physicians' group's challenge to termination of service contract with state did not implicate due process interest because status of employees depended entirely upon their contracts with group, not upon contracts between group and state).

[6] G & G points out that a prime contractor has none of the usual breach of contract remedies. It may not declare a material breach by the awarding body for withholding payments and it may not rescind the contract. The prime contractor must continue to perform, to pay for labor and materials, even if payments have been cut off. The exclusive remedy is a lawsuit. Cal. Labor Code §§ 1731-33.

[7] G & G's complaint seeks declaratory relief from the "facial unconstitutionality of state laws."

of governmental action." 447 U.S. at 789. Specifically, the Court held that residents of a nursing home that had its license revoked did not have a right to a hearing because the revocation "did not directly affect the patients' legal rights or deprive them of any constitutionally protected interest in life, liberty, or property." *Id.* at 790. It further stated, "[T]he fact that the decertification of a home may lead to severe hardship for some of its elderly residents does not turn the decertification into a governmental decision to impose that harm." *Id.* at 789. In a footnote, however, the Court expressly noted:

> We of course need not and do not hold that a person may never have a right to a hearing before his interests may be indirectly affected by government action. Conceivably, for example, if the Government were acting against one person for the purpose of punishing or restraining another, the indirectly affected individual might have a constitutional right to some sort of hearing. But in this case the Government is enforcing its regulations against the home for the benefit of the patients as a whole and the home itself has a strong financial incentive to contest its enforcement decision; under these circumstances the parties suffering an indirect adverse effect clearly have no constitutional right to participate in the enforcement proceedings.

Id. at n.22.

The state's reliance on *O'Bannon* is misplaced.[8] Unlike the nursing home residents in that case, G & G is

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[8] The other cases cited by the state are similarly inapposite. *See Castaneda v. United States Dept. of Agric.*, 807 F.2d 1478 (9th Cir. 1987) (employee of convenience store who was fired after

the target of the state's action here. Hence there is no "indirect" governmental action despite the presence of the prime contractors in the chain of causation. Even if we were to accept the state's contention that its withholding of funds constitutes indirect action, such action would fall within the category expressly left open by the *O'Bannon* Court – action taken by the government against one party for the purpose of punishing or restraining another. Either way, we hold that G & G has suffered a deprivation of a protectible property interest as a result of the state's action.

B. *Process Due*

We now examine whether the state accorded G & G due process when it effected this deprivation. As a general rule, the Due Process Clause requires that individuals receive notice and a meaningful opportunity to be heard *before* the government deprives them of property. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993). Twenty five years ago, the Supreme Court announced an exception to this rule for "extraordinary situations where some valid governmental interest is at stake." *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971)). More

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store was disqualified from food stamp program did not have right to hearing even though employee's fraudulent conduct was cause of termination); *Grove City College v. Bell*, 687 F.2d 684 (3d Cir. 1982), *aff'd*, 465 U.S. 555 (1984) (students of college that refused to comply with requirements of federal student aid program did not have right to hearing before college's eligibility to receive student aid was revoked).

recently, the Court has refined the exception: "An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." *Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240 (1988). Over the years, the Court has broadened this exception considerably, frequently holding a post-deprivation hearing to be sufficient. *Compare Board of Regents*, 408 U.S. at 570 n.7 (describing use of exception as "rare"), *with e.g., Barry v. Barchi*, 443 U.S. 55 (1979) (holding that state's interest in preserving integrity of sport of horse racing justifies lack of pre-deprivation hearing), *and Mallen*, 486 U.S. 230 (holding that state's interest in maintaining public confidence in bank management justifies post-deprivation hearing for removal of bank manager).

Where extraordinary circumstances justify dispensing with a pre-deprivation hearing, however, a prompt post-deprivation hearing must be provided. *See Mallen*, 486 U.S. at 242. In determining whether a post-deprivation hearing procedure is reasonably prompt, a court should "examine the importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken." *Id.*

Here, we have no doubt that the state's interest in ensuring the payment of prevailing wages is sufficiently "important," *see Mallen*, 486 U.S. at 240, to justify the withholding of funds pending the outcome of whatever

kind of hearing may be afforded. Whether a hearing is before or after the giving of notice or the actual withholding is a matter for the state to determine on the basis of the practical considerations involved. *See, e.g., Gilbert v. Homar*, 117 S. Ct. 1807, 1812 (1997) (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

In this case, however, subcontractors like G & G are afforded neither a pre- nor post-deprivation hearing when payments are withheld. Once the state determines that a violation of the prevailing wage law has occurred, it may withhold and disburse money directly to the workers and may impose fines both without providing any hearing at which the subcontractor might challenge the validity of the state's finding. Accordingly, subcontractors have no opportunity to be heard at a meaningful time in a meaningful manner. *See Fuentes*, 407 U.S. at 80. This scheme violates the Due Process Clause of the Fourteenth Amendment.[9]

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[9] Cal. Lab. Code §§ 1730-33. The state's argument that due process is satisfied because an aggrieved party may bring a suit on the contract is unavailing. The state relies on *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986), and *Hudson v. Palmer*, 468 U.S. 517 (1984), which held that in certain circumstances, a post-deprivation remedy under state law may fulfill the requirements of due process. We have stated, however, that "[w]e apply *Parratt* and *Hudson* only when the state administrative machinery did not and could not have learned of the deprivation until after it occurred, not when state officials acted pursuant to state policy and followed state procedures they believed were proper." *Knudson v. City of Ellensburg*, 832 F.2d 1142, 1149 (9th Cir. 1987) (internal quotations omitted). There is no question here, and the state does not contest, that the officials

Although the decision as to what specific type of hearing will be afforded subcontractors may depend upon the factual circumstances, the state must, upon determining that a subcontractor has failed to pay prevailing wages, provide the contractor with a reasonably prompt hearing of some sort.[10] Pending the outcome of such a hearing, the state may withhold payments and penalty funds.[11]

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in this case acted pursuant to state policy and followed state procedures. Thus, Knudson forecloses the state's argument.

Moreover, we doubt the viability of a subcontractor's hypothetical suit against a prime contractor based on theories of breach of the covenant of good faith and fair dealing or equitable subrogation. The state and amici curiae have been unable to cite a single California case utilizing either theory in this context. The prime contractor could easily defeat any breach of covenant suit by demonstrating that its withholding of payment was authorized by law. *See* § 1729. And the facts of this case clearly do not meet the traditional elements of equitable subrogation. *See Caito v. United California Bank*, 576 P.2d 466, 471 (Cal. 1978).

[10] The question of when a post-deprivation hearing is adequate is separate from the question of what constitutes a sufficient post-deprivation procedure. The Supreme Court has made it clear that no single model is required in all cases, but that the nature of the deprivation and the other underlying circumstances dictate how much process is due. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982) (citing *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19 (1978); *Goss v. Lopez*, 419 U.S. 565, 579 (1975)).

[11] Contrary to the state's concerns, our decision today does not affect the validity of the Davis-Bacon Act, 40 U.S.C. §§ 276a *et seq.*, upon which the California law was patterned, because the Davis-Bacon Act provides for an extensive hearing and appeal structure through its implementing regulations. Within 30 days after a withholding, either the prime contractor or the

IV. Other Issues Raised by the State

The state asserts that G & G's summary judgment motion was premature and hence should have been denied. Federal Rule of Civil Procedure 56(a) allows a motion for summary judgment to be made any time more than twenty days after commencement of the action. G & G's motion complied with this rule and with the notice requirements under Local Rule 7.4.[12] Moreover, the state did not file a Rule 56(f) declaration indicating why it needed discovery and the facts it hoped to discover. Given the state's receipt of adequate notice and an opportunity to respond to the motion, and its failure to file a Rule 56(f) declaration, the district court did not err in considering the summary judgment motion.

The state also contends that the individual defendants in this case are entitled to qualified immunity. "Qualified immunity is an affirmative defense to *damage liability*; it does not bar actions for declaratory or injunctive relief." *American Fire, Theft & Collision Managers, Inc. v. Gillespie*, 932 F.2d 816, 818 (9th Cir. 1991) (internal

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subcontractor may request an administrative hearing to review the findings of the Administrator of the Wage and Hour Division of the Department of Labor. 29 C.F.R. § 5.11. The findings and rulings of the administrator may be appealed to an administrative law judge ("ALJ"), whose decision may be appealed to the Wage Appeals Board. *Id.* Ultimately, the Board's decision may be appealed to the federal court. 5 U.S.C. § 704.

[12] G & G points out that it had filed essentially the same motion in a prior case, relying on the same authorities cited here. Thus, the state was aware of G & G's argument and the authorities on which it relied.

quotation omitted) (emphasis added). Therefore, the individual defendants cannot claim qualified immunity as an affirmative defense to this action seeking declaratory and injunctive relief.

In addition, the district court did not err in denying the state's motion to dismiss. The state asserts that defects on the face of the complaint mandated its dismissal, but these alleged defects relate to issues such as standing, whether G & G was deprived of any constitutional right, and the qualified immunity defense. To the extent that we have decided all of these issues in G & G's favor, we affirm the district court's decision.

V. The Injunction

The district court's judgment declared seven separate provisions of the California Labor Code unconstitutional and enjoined the state from enforcing any of those provisions against G & G. The state argues that the injunction is overbroad, and we agree.

When a federal court holds that a constitutional violation has occurred, the nature of the remedy it grants must be determined by the nature and the scope of the constitutional violation. *Milliken v. Bradley*, 433 U.S. 267, 280 (1977); *see also Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established. . . . "). In devising a remedy for constitutional violations by state agencies or officials, the court "must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Id.*

The district court's injunction here was overbroad in two respects. First, by invalidating *all* California Labor Code provisions relating to the withholding procedure, the district court created a remedy beyond what was required to address the constitutional violation – the state's failure to provide subcontractors like G & G a pre- or post-deprivation hearing as required by the Due Process Clause. Declaring the withholding provisions to be unconstitutional *as applied* is sufficient relief, as it allows the state to remedy the violation by adopting regulations providing for a pre- or post-deprivation hearing and to manage its own affairs in a manner consistent with the Constitution. *See Milliken*, 433 U.S. at 280.

Second, the district court issued a permanent injunction prohibiting the state from enforcing the withholding provisions against G & G. The sweeping nature of this relief suggests that even if the state were to provide G & G with an extensive hearing procedure, it still would be enjoined from penalizing G & G for noncompliance and noncooperation, from obtaining the disputed funds from the awarding body, and from disbursing back wages to underpaid workers even if G & G did not contest the withholding. In short, the district court has simply prohibited the state from enforcing the prevailing wage law against G & G. The appropriate course in this case, given all the circumstances, would be to enjoin the state from enforcing the withholding provisions against G & G unless within a reasonable period it chooses to adopt procedures that afford G & G and others either a pre- or post-deprivation hearing, and to specify the time within which the state must do so.

We vacate the district court's injunction and remand for a modification in the manner stated.

VI. Attorney Fees

In a companion appeal that has been submitted on the briefs and consolidated with this case, the state contests the district court's award of attorney fees to G & G following its grant of a permanent injunction in G & G's favor. Specifically, the state asserts that the district court abused its discretion in (1) determining that G & G was the prevailing party under 42 U.S.C. § 1988; (2) awarding attorney fees in light of G & G's alleged failure to satisfy the applicable criteria for such relief; and (3) awarding attorney fees to G & G for work performed in a previous lawsuit alleging identical claims for relief against the same defendants.

A. *Procedural History*

In December 1994, G & G filed a lawsuit entitled *G & G Fire Sprinklers, Inc. v. Juan Garza et al.*, No. CV-94-8542 R ("the *Garza* lawsuit"). G & G's claims in the *Garza* lawsuit were the same as those presented in this case. The *Garza* lawsuit ended in a settlement agreement providing that G & G could refile the lawsuit if the state took further action against G & G, which is precisely what happened. The state's further action – a subsequent notice to withhold – prompted G & G to file the present action.

After the district court's grant of the injunction, the state filed a motion to stay the judgment in this Court,

which was denied by a motions panel. Next, the district court issued an attorney fees award totaling $25,830.28, which is the subject of this appeal. Subsequently, we reconsidered our previous denial of the motion to stay the judgment, granted a stay pending appeal, and set the case for an early hearing on the merits.

B. *Prevailing Party*

The state argues that G & G is not a prevailing party under 42 U.S.C. § 1988 because while it received the relief it requested – an injunction – the staying of that injunction somehow nullified its legal effect or its mandate that the state alter its unlawful conduct. We reject this argument.

In *Farrar v. Hobby*, the Supreme Court held that to be considered a prevailing party, a plaintiff must "obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement." 506 U.S. 103, 111 (1992) (citations omitted). "In short, a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.* at 111-12.

Here, G & G obtained an injunction from the district court, which materially altered the legal relationship between the parties by prohibiting the state from depriving G & G of property without any hearing. Certainly that change benefitted G & G and it is the prevailing party. *See Herrington v. County of Sonoma*, 883 F.2d 739, 744 (9th Cir. 1989) (injunction, which appellate court upheld, rendered

plaintiffs prevailing parties despite vacatur of damage award); *see also Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541, 543 (3d Cir. 1994) (plaintiff who has received injunctive relief has prevailed for purposes of section 1988). That a stay was issued after the district court's grant of the injunction does not alter G & G's status as the prevailing party in the district court, as the district court's judgment is a statement of the rights of the parties unless and until that judgment is altered by a higher court. We have decided not to do so.

C. *General Award of Fees*

The state also claims that the district court erroneously awarded attorney fees based solely on the declaration of Stephen A. Seideman ("Seideman declaration"), G & G's attorney in the district court.[13] More specifically, the state argues that the Seideman declaration fails to discuss many of the factors discussed in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975), to be considered by a district court in awarding attorney fees. These include: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment due to acceptance of the case; (5) the customary fee; (6) the contingent or fixed nature of the fee; (7) the limitations imposed by the client or the case; (8) the amount involved and the results obtained;

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[13] The state does not dispute any specific items, such as the services provided or the hourly rate, or the total amount of fees; it simply asserts that G & G's evidence was not sufficient to support an award of fees.

(9) the experience, reputation, and ability; (10) the undesirability of the case; (11) the nature of the professional relationship with the client; and (12) awards in similar cases.

A district court, however, need not discuss each and every factor separately in making its decision. Rather, a strong presumption exists that the lodestar (reasonable number of hours times reasonable hourly rate) represents a reasonable fee, and "many of these factors usually are subsumed" within the lodestar calculation. *Jordan v. Multnomah County*, 815 F.2d 1258, 1262 (9th Cir. 1987) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)). Thus, G & G only had to prove that its hourly rate was reasonable and that the total number of hours expended was reasonable. *See Dennis v. Chang*, 611 F.2d 1302, 1308 (9th Cir. 1980) (award of attorney fees properly granted where based solely on skill and experience of counsel, rates of compensation "typical" of those charged by attorneys for comparable service, and reasonable amount of time spent).

Nevertheless, we agree with the state that G & G did not satisfy its "burden of producing satisfactory evidence, *in addition to the affidavits of its counsel*, that the requested rates are in line with those prevailing in the community for similar services of lawyers of reasonably comparable skill and reputation." *Jordan*, 815 F.2d at 1263 (emphasis added). The only evidence in the record about the hourly rate is Mr. Seideman's statement in his declaration that "[t]he hourly rates which I billed Plaintiff are equal to or less than those generally billed by attorneys in Los Angeles for similar services," and a similar statement

with regard to the paralegal's hourly rates. These statements constitute an "insufficient basis from which to conclude that the rates requested are 'reasonable.' " *Southerland v. International Longshoremen's and Warehousemen's Union*, 845 F.2d 796, 801 (9th Cir. 1987). Therefore, while G & G certainly is entitled to fees, we remand to the district court the issue of whether the claimed hourly rates are reasonable. On remand, both G & G and the State should be allowed to supplement the record with additional evidence so that the district court can reevaluate the reasonableness of the fees requested.

In addition, we do not find persuasive the state's related argument that the California Division of Labor Standards Enforcement ("DLSE") and the Department of Industrial Relations were not made parties to the present suit until the First Amended Complaint on September 7, 1995 and hence should not be held accountable for any fees incurred prior to that time. We hold that these parties are jointly and severally liable for the fees, given that the work involved aided in the preparation of the case against all the defendants and the case was not one in which the claims against each defendant varied or one defendant was more culpable than another. *See Woods v. Graphic Communications*, 925 F.2d 1195, 1207 (9th Cir. 1991) (defendant liable for fees previously incurred where fees assisted in preparing case against defendant and served as developmental work for case).

D. *Award of Fees for Work Performed in Previous Lawsuit*

The state asserts that the district court should not have allowed G & G to recoup attorney fees from the *Garza* lawsuit given that it did not prevail in that lawsuit. We uphold the district court's decision.

In *Webb v. Board of Educ.*, 471 U.S. 234, 243 (1985), the Supreme Court affirmed a district court's decision to deny attorney fees for time spent pursuing optional administrative remedies, specifically school board proceedings. But the Court noted that the petitioner in that case "made no suggestion below that any discrete portion of the work product from the administrative proceedings was work that was both useful and of a type ordinarily necessary to advance the civil rights litigation to the stage it reached before settlement," *id.*, suggesting that if that had happened, maybe the result would have been different. We followed the Supreme Court's lead in *Rock Creek Ltd. Partnership v. State Water Resources Control Bd.*, 972 F.2d 274, 279 (9th Cir. 1992), holding that a sponsor of a hydroelectric project was not entitled to attorney fees under §§ 1983 and 1988 for administrative proceedings before FERC. We reasoned that the FERC proceeding was not a condition precedent to plaintiff's entry to federal court, nor was it a part of a continuing federal court action. Because the FERC proceeding was not related or dependent, it could not form the basis for attorney fees. *Id.*

Cases from other circuits have addressed similar fee issues in non-administrative contexts. For example, the Third Circuit held in *Keenan v. City of Philadelphia*, 983

F.2d 459, 474 (3d Cir. 1992), that the district court did not abuse its discretion in including the time spent in labor arbitration in its fee calculation. It based its decision on the following interpretation of *Webb* by the Third Circuit: "[F]or the time spent pursuing optional administrative proceedings properly to be included in the calculation of a reasonable attorney's fee, the work must be 'useful and of a type ordinarily necessary' to secure the final result obtained from the litigation." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 561 (1986). In addition, the Eighth Circuit briefly addressed a similar situation in *Perkins v. Cross*, 728 F.2d 1099, 1100 (8th Cir. 1984), an action by picketers against municipal officials for violation of their civil rights. The court held that fees could be awarded for any "time the lawyer spent defending the plaintiffs in the original municipal court proceeding to the extent, if any, that research or investigation done in connection with that proceeding proved directly relevant to the successful prosecution of [their] later civil rights claims." *Id.*

Here, G & G made a showing that the work done in the *Garza* lawsuit was directly related to the present action – the allegations in that suit were identical to those made here. Counsel for G & G stated that the legal research and analysis performed in *Garza* were necessary for this action and accordingly saved him from expending more time on this lawsuit. Thus, unlike the *Rock Creek* case, the prior proceeding here was related to the present action. The two can even be viewed as a continuum of proceedings necessary to achieve the relief finally granted, given that the *Garza* case ended in a settlement stating that if the state took further action, G & G could

refile the lawsuit, which is what happened. Moreover, caselaw reveals no requirement that a party must have prevailed in a prior proceeding to use that as a basis for attorney fees in another action.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART. Costs to Appellee G & G Fire Sprinklers, Inc.

KOZINSKI, Circuit Judge, dissenting.

In *San Bernardino Physicians' Services Medical Group v. County of San Bernardino*, 825 F.2d 1404 (9th Cir. 1987), we held that "[i]t is neither workable nor within the intent of section 1983 to convert every breach of contract claim against a state into a federal claim." *Id.* at 1408 (footnote omitted). While we recognized that any contract with the state gives rise to what could be characterized as a property interest, we held that this alone is not a basis for invoking the protections of due process. Rather, the interest in question must fall within a narrow category that might fairly be characterized as a civil right, *see id.* at 1409, a right in public employment being the quintessential example. *See id.* (citing *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972)). *San Bernardino* said that "construction contracts [and] purely material supply contracts" – contracts like the one we have here – do *not* create rights protected by the due process clause. *Id.* at 1410.

The majority abandons *San Bernardino*'s nuanced framework in favor of a categorical approach that turns every right to receive payment on a public works contract into a property right protected by due process: "G & G's interest arises from its public works contract; it has a property interest in being paid in full for the construction

work it has completed." Maj. op. at 10658. The opinion thus conflicts with *San Bernardino*, as well as the opinions of two other circuits. *See Mid-American Waste Sys., Inc. v. City of Gary*, 49 F.3d 286, 291 (7th Cir. 1995); *Walentas v. Lipper*, 862 F.2d 414, 418 (2d Cir. 1988); *S & D Maintenance Co. v. Goldin*, 844 F.2d 962, 966 (2d Cir. 1988).

It is also very bad policy. The state here is engaged in a commercial activity; it holds no special sway over other parties by virtue of its regulatory powers. In carrying out its project, the state has bargained for the construction to be done according to plan, on schedule, and consistent with health and safety codes; these are ordinary terms just like the ones private parties put into their construction contracts. The state has also bargained for a more exotic term, namely that contractors and subcontractors pay a prevailing wage to their employees. While this differs from what ordinarily appears in private construction contracts, it is not an exercise of the state's regulatory power; rather, it is a term that any private party could equally well put into its contract. If the contractor or subcontractor doesn't like the term, he can refuse to do business with the state.[1]

Here the state determined that G & G did not comply with its prevailing wage obligation, and thus withheld payments. This is no different from a builder's refusal to make progress payments when he discovers (or believes he has discovered) a failure of performance on any other term of a standard construction contract – for example,

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[1] That the prevailing wage term appears in the California Labor Code doesn't matter. No one is forced to comply unless he agrees to do business with the state.

that the plumbing isn't up to code. Withholding payments under such circumstances is the standard remedy. Even if the general contractor were to take the position that the subcontractor could not recover from it because of Cal. Labor Code § 1729, *see* maj. op. at 10663 n.9, the subcontractor would be able to proceed against the state. Labor Code § 1733 provides that suit may be brought by the contractor or the contractor's assignee against the awarding body to recover sums withheld. If the contractor refuses to assign its right to sue for the money withheld to the subcontractor, the subcontractor could sue under the theory of equitable subrogation, which the California Supreme Court has held "is broad enough to include every instance in which one person, not acting as a mere volunteer or intruder, pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter." *Caito v. United California Bank*, 20 Cal. 3d 694, 704 (1978) (quoting *Rhine v. Kemmerrer*, 114 Cal. App. 2d 810, 814 (1952)) (internal quotation marks omitted). This is a run-of-the-mill contract dispute just like thousands routinely handled by the state courts without federal intervention.

In lieu of this common sense solution – which also complies with binding precedent – the majority invokes the full panoply of federal due process, including the requirement of a pre-deprivation or prompt (whatever that litigation-inviting term means) post-deprivation hearing, whenever the state wishes to withhold payments for what it believes is defective performance under the contract. While the opinion addresses only the prevailing wage term, its logic carries much farther: If the state discovers any other type of breach – for example, failure

to complete the project on time or to comply with applicable safety codes – it must provide such a hearing as an added price for the standard remedy of withholding payment. This gravely burdens the state's most potent remedy for dealing with recalcitrant contractors and subcontractors. Why the state should be saddled with this yoke when it engages in the purely commercial activity of construction – a burden not suffered by private builders – is beyond me.[2] *San Bernardino* clearly teaches that commercial contract rights must be vindicated in state court using state remedies. By ignoring this teaching the majority creates not just an intra-circuit and inter-circuit conflict but also a wholly unwarranted burden on the thousands of states, counties, cities and special use districts governed by our law. Government is too unwieldy already; there is no justification for adding this heavy layer of red tape. I respectfully dissent.

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[2] We can't always expect the government to act with unbounded compassion, patience and generosity. Indeed, when the government is acting as a commercial entity, taxpayers cajole it to act with all the ferociousness the marketplace demands. Certain limits must always apply: The government cannot, for example, use public works contracts to discriminate on the basis of race or sex. But when the government bargains over the commercial terms of the contract it should enjoy the same ability as private builders to draw up the deal as it likes and seek the best price and the best terms the marketplace allows.

G & G FIRE SPRINKLERS, INC.,

Plaintiff-Appellee,

v.

VICTORIA L. BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California,

Defendants-Appellants.

No. 96-55194
D.C. No.
CV-95-004839-R

Appeals from the United States District Court
for the Central District of Califorina
Manuel L. Real, Chief District Judge, Presiding

No. 95-56639
Agrued and Submitted
May 7, 1996 – Pasadena, California

No. 96-55194
Submitted August 27, 1997*
Pasadena, California

Filed February 3, 1998

Before: Stephen Reinhardt, Alex Kozinski and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Hawkins; Dissent by Judge Kozinski

COUNSEL

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Stephen A. Seideman, Levin, Stein, Chyten & Schneider, Los Angeles, California, for the plaintiff-appellee in No. 95-56639.

Thomas J. McDermott and Harvey Rochman, Manatt, Phelps & Phillips, Los Angeles, California, for the plaintiff-appellee in No. 96-55194.

OPINION

HAWKINS, Circuit Judge:

This case requires us to decide whether certain California Labor Code provisions, authorizing the state to seize money and impose penalties for a subcontractor's failure to comply with prevailing wage requirements,

*The panel finds this case appropriate for submission without agrument pursuant to Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

violate the Due Process Clause of the Fourteenth Amendment because no notice or hearing is required before such adverse action is taken. Specifically, Victoria L. Bradshaw, Labor Commissioner of the State of California, and others appeal the district court's order granting summary judgment in favor of G & G Fire Sprinklers, Inc. ("G & G"), the public works subcontractor here, and permanently enjoining Bradshaw from enforcing California Labor Code §§ 1727, 1730-33, 1775, 1776(g) and 1813 against G & G for alleged violations of California prevailing wage laws. We hold that G & G has standing to maintain this action and that due process requires either a pre- or post-deprivation hearing, but that the district court's injunction should be narrowed to apply only until such time as the state may adopt by regulation or otherwise appropriate procedures affording such hearings.

I. Facts

A. *The Parties*

Appellee G & G is a fire protection company that installs fire sprinkler systems. G & G has performed numerous public works projects as a contractor or subcontractor. Appellants are the California Division of Labor Standards Enforcement ("DLSE"), Department of Industrial Relations, and officials thereof (collectively "the state").

B. *The California Labor Code*

The California Labor Code requires contractors and subcontractors on public works projects to pay a state-determined prevailing wage to all their workers. Cal.

Lab.Code § 1771. To enforce this requirement, the body awarding the contract ("the awarding body") is allowed to withhold funds from a prime contractor should it determine that the contractor or one of its subcontractors has violated the prevailing wage law. § 1727. The state is authorized to withhold an amount equal to the total amount that all the workers have been underpaid, as well as up to $50 per day, per worker in fines for each instance in which the contractor fails to pay the prevailing wage. § 1775. A withholding order can only be issued after a full investigation by DLSE or the awarding body, unless the withholding is from the final payment to be made to the prime contractor. § 1727. If the violator is a subcontractor, the prime contractor is authorized to withhold an equivalent amount from its payments to the subcontractor. § 1729. All of these provisions must be incorporated into all public works contracts. Cal. Admin. Code, Title 8, § 16430.

A notice to withhold to an awarding body is a standard procedure utilized by DLSE, but no notice or hearing is required prior to its issuance. DLSE is not required to produce any evidence of a violation of the law, no specific standard is applied in determining whether to issue a notice to withhold, and no procedure exists to guard against the issuance of improper or excessive notices to withhold. Moreover, while DLSE has no formal procedures for conducting investigations, as a general rule, information from a witness/informant must be verified with an independent source. In addition, recommendations to withhold must be reviewed by a supervisor.

The exclusive remedy after withholding is a lawsuit by the prime contractor against the awarding body for

recovery of the money withheld. §§ 1730-33. Such a suit must be filed within 90 days of the withholding, and the contractor bears the burden of establishing that there was no violation. § 1733. DLSE may defend the lawsuit upon request by the awarding body. *Id.* Subcontractors are not given the right to bring suit, although a prime contractor is allowed to assign its right to sue. *Id.* If a suit is not brought within 90 days, the state disburses the withheld funds to the underpaid workers; if a suit is brought within this period, then the money is held in escrow until its resolution. § 1731.

C. *The Dispute*

This case arose when DLSE issued three withholding notices against G & G for a total of at least $120,000. The notices were for three separate projects on which G & G had served as a subcontractor.[1] The awarding bodies for each of the projects have withheld money from the prime contractors, who in turn have withheld payment from G & G. No evidence in the record explains in detail the basis for the state's decision to withhold funds from G & G.

The issuance of the notices to withhold has a substantial detrimental effect on G & G's ability to do business, as their effect is to reduce, or cut off, payments for work performed and to damage G & G's reputation in the industry. Inasmuch as G & G intends to perform further

[1] Withholding notices had also been issued on projects on which G & G had served as the prime contractor, but those notices were withdrawn before this suit ensued.

public works projects in the future, the issuance of additional improper notices to withhold also could impair G & G's cash flow and ability to do business.

G & G filed this action for declaratory and injunctive relief, claiming that the issuance of the notices to withhold without a prior hearing constitutes a deprivation of property without due process of law in violation of the Fourteenth Amendment. The state responded with a motion to dismiss, and G & G later filed a motion for summary judgment. The district court granted G & G's motion for summary judgment and denied the state's motion to dismiss. The district court's judgment declares sections 1727, 1730-33, 1775, 1776(g) and 1813 of the California Labor Code and the state's practices thereunder unconstitutional and enjoins the state from enforcing these sections against G & G.

II. Standing

We first address whether G & G has standing to maintain this action.[2] The state argues G & G does not

[2] We note at the outset that whether a party has standing is a separate question from whether a party has an interest protected by the Due Process Clause – here, a property interest. "Standing to bring a state court claim of deprivation of property rights does not establish a protected property interest." *Kim Constr. Co. v. Board of Trustees*, 14 F.3d 1243, 1249 (7th Cir. 1994). Moreover, that a party has no constitutionally protected property interest under a statute does not mean that it has no standing to bring a claim under that statute. *See id.*

Accordingly, cases such as *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773 (1980), and *San Bernardino Physicians' Servs. Med. Group, Inc. v. County of San Bernardino*, 825 F.2d 1404 (9th

have standing because subcontractors lack privity of contract with the state under the Labor Code and because the state withheld monies from the prime contractors, not G & G, thus precluding any direct causal connection between G & G's alleged injury and the state's conduct.

Standing is a question of law that we review de novo. *Sahni v. American Diversified Partners*, 83 F.3d 1054, 1056 (9th Cir. 1996). To establish standing, a federal plaintiff must show (1) an injury in fact; (2) a causal connection between the injury and the conduct complained of; and (3) that it is likely, as opposed to speculative, that the injury will be redressed by favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

To establish injury in fact, a plaintiff must demonstrate that the injury is "concrete and particularized" and that it is "actual or imminent, not conjectural or hypothetical." *Id.* at 560. The injury here is both concrete and actual. As a result of the state's withholding procedures, G & G has not been paid approximately $120,000, to which it claims it is entitled. G & G meets the first requirement for standing.

A plaintiff must also show that the injury "fairly can be traced to the challenged action of the defendant" and that it does not result "from the independent action of some third party not before the court." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). The

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Cir. 1987), which the state cites to argue that G & G has no standing, are inapposite because they address whether parties have protectible property interests, not standing.

Supreme Court detailed the methodology to be followed in determining causation in a case of this type:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of the facts that must be averred (at the summary judgment stage) . . . in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment . . . will redress it. When . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction . . . it becomes the burden of the plaintiff to adduce facts showing that those choices [of the third party] have been or will be made in such manner as to produce causation and permit redressability of injury.

Lujan, 504 U.S. at 561-62 (emphasis in original).

The state contends that G & G cannot establish causation because this case involves the state's regulation of a third party, the prime contractors, whose own independent choices are an intervening cause of G & G's injury. Specifically, the state cites California Labor Code § 1729, which states that "[i]t shall be *lawful* for any contractor to withhold from any subcontractor under him sufficient sums to cover any penalties withheld from him" (emphasis added), in support of its argument that the prime contractors were not required to withhold money

from G & G and that their decision to do so was the true cause of G & G's injury.

This argument elevates form over substance. The state's action here is targeted at G & G; the prime contractors' only role in the dispute is that of a conduit, not some third party whose independent choices caused G & G's injury. The state investigated G & G's conduct, not the prime contractors', and the withholding notices explicitly named G & G as the violator of the California Labor Code. G & G was clearly the "object of the action" as the Supreme Court used the term. As such, the state's conduct is the cause of G & G's injury: the money would not have been withheld but for the state's actions.[3] That was the intended result of the state's action, in accordance with the overarching purpose of its regulatory scheme to ensure that prime contractors and subcontractors pay their workers the state-determined prevailing wage.

Even if we somehow assume that G & G is not itself the object of the action, but is indirectly affected by the state's regulation of the prime contractors, our conclusion

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[3] This case differs from those in which the Supreme Court has found the requisite "but for" causation lacking. *See, e.g., ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989) (individual taxpayers and teachers' organization lacked standing to challenge Arizona land management statute when only alleged injuries were increased taxes and reduced school funding because of impossibility of showing statute had direct causal impact on taxes or school funding); *Simon*, 426 U.S. at 26 (plaintiffs lacked standing to sue due to inability to establish causal relationship between IRS ruling and hospitals' decisions not to provide treatment); *Warth v. Seldin*, 422 U.S. 490 (1975) (plaintiffs asserting inability to find homes in city based on exclusionary zoning practices failed to establish causation).

would be the same. That the harm to G & G may have resulted indirectly does not in itself preclude standing. As the Supreme Court stated in *Warth v. Seldin*, 422 U.S. at 505:

> When a governmental prohibition or restriction imposed on one party causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights.

Furthermore, G & G can show that the prime contractors' (third party) choices "have been or will be made in such a manner as to produce causation and permit redressability of injury." *Lujan*, 504 U.S. at 562. Here, the prime contractors have withheld payment from G & G, completing the causal link between G & G's injury and the state's action and permitting redressability. Accordingly, G & G's injury can be directly traced to the state's conduct and the second requirement for standing is also satisfied.

To meet the third requirement for standing, a plaintiff must show that his injury will be redressed if he prevails in his legal action. In this case, G & G's injury will be redressed by this suit because if G & G prevails, the withheld money will be released to the prime contractors, who will be obligated by contract to pay it to G & G.

That G & G as a subcontractor lacks privity of contract with the state only bolsters our conclusion. Under California's Labor Code, subcontractors cannot sue the state for withholding funds; only prime contractors can. A subcontractor theoretically could sue the prime contractor, but the latter has a defense of withholding the

funds pursuant to state law. In addition, the Labor Code does not grant subcontractors the right to any type of hearing to contest a withholding. Therefore, if a prime contractor chooses not to contest a withholding or to assign its rights to sue to the subcontractor, the subcontractor is left holding a quite empty bag.[4]

G & G has standing to maintain this suit.

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[4] The state cites *Lloyd v. Stewart & Nuss, Inc.*, 327 F.2d 642, 645-46 (9th Cir. 1964), for the proposition that a subcontractor has no property right to funds withheld by an awarding body and hence has no standing to challenge such a withholding. We reject this argument for several reasons.

First, *Lloyd* is a bankruptcy case holding that amounts withheld from a prime contractor by the state upon request of a trucking service doing work for a subcontractor did not constitute property owned or possessed by the debtor subcontractor and hence the bankruptcy court had no summary jurisdiction over the property. The case does not even involve constitutional issues, let alone due process concerns, and it never discusses standing. Second, even if we were to deem *Lloyd* remotely relevant to this case, its decision that the subcontractor debtor had no property right in the debt owed to the prime contractor by the state sheds no light on whether a subcontractor has a protectible property interest in wages withheld from it pursuant to state law. In fact, *Lloyd* acknowledges that the subcontractor and the trucking service "both possessed the right to claim against the fund, but only in the event they were not paid by their respective principal obligors." *Id.* at 646. Here, G & G was not paid by its respective principal obligor, the prime contractor, and it is asking for an opportunity to contest that deprivation.

III. Due Process Claim

A due process claim has two elements: (1) a deprivation of a protectible interest, and (2) denial of adequate procedural protections. *See Goldberg v. Kelly*, 397 U.S. 254 (1970). We consider each of these elements in turn.

A. *Protectible Interest*

To determine whether G & G has suffered a deprivation of a protectible interest, we must evaluate (1) what type of interest has been deprived, and (2) whether that interest is protected by the Due Process Clause. *Board of Regents of State Colleges v. Roth*, 408 U.S. 569-70 (1972). G & G's interest arises from its public works contract; it has a property interest in being paid in full for the construction work it has completed. *See Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342 (1969) (holding that Wisconsin's garnishment procedure allowing wages to be frozen upon request of creditor's lawyer constituted "obvious" deprivation of property). The state's withholding of over $120,000 has deprived G & G of its interest in full payment for services rendered.

The state quite properly notes, however, that not all property interests are protected by the Due Process Clause. While both federal and California law recognize that a contract with the state can create a constitutionally protected property interest, *Perry v. Sindermann*, 408 U.S. 593, 601 (1972); *Walker v. Northern San Diego County Hosp. Dist.*, 185 Cal.Rptr. 617, 620 (1982), not all public contracts give rise to a protectible due process interest. *See San Bernardino Physicians' Servs. Med. Group, Inc.*, 825 F.2d at 1408. Indeed, because any breach of contract claim

against the state logically can be construed as a due process claim, " 'we must bear in mind that the Fourteenth Amendment was not intended to shift the whole of the public law of the states into the federal courts.' " *Id.* (quoting *Brown v. Brienen*, 722 F.2d 360, 364 (7th Cir. 1983)).

> Even though every contract may confer some legal rights under state law, that fact alone need not place all contracts within federal due process protection. Although the underlying substantive interest is created by an independent source such as state law, federal constitutional law determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause.

Id. at 1408-09 (internal quotations omitted).

Drawing on these principles, the state asserts that because the withholding procedure at issue is contained in G & G's contract, this case is nothing more than a contractual dispute that does not rise to the level of a constitutional claim. Moreover, the state argues that construing this case to present a constitutional claim would result in the "federalization" of state contract law by giving G & G and all others who contract with the state an opportunity to have their grievances reviewed in federal court when they should be confined to their contractually bargained-for remedies under state law. This argument, however, misses the mark. Unlike the cases cited by the state, this case does not involve a breach of

contract claim or a challenge to the contract itself.[5] G & G concedes that the express terms of the contract grant the state the authority to withhold funds for wage violations; the withholding is not a breach of contract.[6] Instead, G & G challenges the constitutionality of several provisions of the California Labor Code as violative of its

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[5] All the cases cited by the state to support its argument that G & G's interest is not constitutionally protected involve due process claims arising from an alleged breach of contract. *See, e.g., Unger v. National Residents Matching Program*, 928 F.2d 1392, 1399 (3d Cir. 1991) (termination of residency program after plaintiff's acceptance into program failed to implicate due process rights because contract with university hospital did not confer protected status and did not include provision of for-cause termination only); *S & D Maintenance Co. v. Goldin*, 844 F.2d 962, 968-69 (2d Cir. 1988) (contractor alleging state breached contract by withholding funds pending result of criminal investigation failed to establish due process claim because neither contract nor state law contained for-cause termination provision or right to prompt payment); *San Bernardino Physicians' Servs. Med. Group, Inc.*, 825 F.2d at 1406 (physicians' group's challenge to termination of service contract with state did not implicate due process interest because status of employees depended entirely upon their contracts with group, not upon contracts between group and state).

[6] G & G points out that a prime contractor has none of the usual breach of contract remedies. It may not declare a material breach by the awarding body for withholding payments and it may not rescind the contract. The prime contractor must continue to perform, to pay for labor and materials, even if payments have been cut off. The exclusive remedy is a lawsuit. Cal. Labor Code §§ 1731-33.

federal due process rights.[7] Those provisions, incorporated by state law into all public works contracts, authorize the state to withhold payment of money owed to contractors or subcontractors for alleged violations of the state prevailing wage law. This case thus involves a direct constitutional challenge to these statutes, not a mere contractual dispute.

The state, relying on *O'Bannon*, 447 U.S. at 773, also contends that G & G's property interest is not protectible because this case involves the indirect effects of state action. In *O'Bannon*, the Supreme Court reiterated the principle that "the due process provision of the Fifth Amendment does not apply to the indirect adverse effects of governmental action." 447 U.S. at 789. Specifically, the Court held that residents of a nursing home that had its license revoked did not have a right to a hearing because the revocation "did not directly affect the patients' legal rights or deprive them of any constitutionally protected interest in life, liberty, or property." *Id.* at 790. It further stated, "[T]he fact that the decertification of a home may lead to severe hardship for some of its elderly residents does not turn the decertification into a governmental decision to impose that harm." *Id.* at 789. In a footnote, however, the Court expressly noted:

> We of course need not and do not hold that a person may never have a right to a hearing before his interests may be indirectly affected by government action. Conceivably, for example, if the Government were acting against one person

[7] G & G's complaint seeks declaratory relief from the "facial unconstitutionality of state laws."

> for the purpose of punishing or restraining another, the indirectly affected individual might have a constitutional right to some sort of hearing. But in this case the Government is enforcing its regulations against the home for the benefit of the patients as a whole and the home itself has a strong financial incentive to contest its enforcement decision; under these circumstances the parties suffering an indirect adverse effect clearly have no constitutional right to participate in the enforcement proceedings.

Id. at n.22.

The state's reliance on *O'Bannon* is misplaced.[8] Unlike the nursing home residents in that case, G & G is the target of the state's action here. Hence there is no "indirect" governmental action despite the presence of the prime contractors in the chain of causation. Even if we were to accept the state's contention that its withholding of funds constitutes indirect action, such action would fall within the category expressly left open by the *O'Bannon* Court – action taken by the government against one party for the purpose of punishing or restraining another. Either way, we hold that G & G has suffered a

[8] The other cases cited by the state are similarly inapposite. *See Castaneda v. United States Dept. of Agric.*, 807 F.2d 1478 (9th Cir. 1987) (employee of convenience store who was fired after store was disqualified from food stamp program did not have right to hearing even though employee's fraudulent conduct was cause of termination); *Grove City College v. Bell*, 687 F.2d 684 (3d Cir. 1982), *aff'd*, 465 U.S. 555 (1984) (students of college that refused to comply with requirements of federal student aid program did not have right to hearing before college's eligibility to receive student aid was revoked).

deprivation of a protectible property interest as a result of the state's action.

B. *Process Due*

We now examine whether the state accorded G & G due process when it effected this deprivation. As a general rule, the Due Process Clause requires that individuals receive notice and a meaningful opportunity to be heard *before* the government deprives them of property. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993). Twenty five years ago, the Supreme Court announced an exception to this rule for "extraordinary situations where some valid governmental interest is at stake." *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971)). More recently, the Court has refined the exception: "An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." *Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240 (1988). Over the years, the Court has broadened this exception considerably, frequently holding a post-deprivation hearing to be sufficient. *Compare Board of Regents*, 408 U.S. at 570 n.7 (describing use of exception as "rare"), *with e.g., Barry v. Barchi*, 443 U.S. 55 (1979) (holding that state's interest in preserving integrity of sport of horse racing justifies lack of pre-deprivation hearing), *and Mallen*, 486 U.S. 230 (holding that state's interest in maintaining public confidence in bank management justifies post-deprivation hearing for removal of bank manager).

Where extraordinary circumstances justify dispensing with a pre-deprivation hearing, however, a prompt post-deprivation hearing must be provided. *See Mallen*, 486 U.S. at 242. In determining whether a post-deprivation hearing procedure is reasonably prompt, a court should "examine the importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken." *Id.*

In this case, subcontractors like G & G are afforded neither a pre-nor post-deprivation hearing when payments are withheld. Once the state determines that a violation of the prevailing wage law has occurred, it may withhold and disburse money directly to the workers and may impose fines both without providing any hearing at which the subcontractor might challenge the validity of the state's finding. Accordingly, subcontractors have no opportunity to be heard at a meaningful time in a meaningful manner. *See Fuentes*, 407 U.S. at 80. This scheme violates the Due Process Clause of the Fourteenth Amendment.[9]

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[9] Cal. Lab.Code §§ 1730-33. The state's argument that due process is satisfied because an aggrieved party may bring a suit on the contract is unavailing. The state relies on *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986), and *Hudson v. Palmer*, 468 U.S. 517 (1984), which held that in certain circumstances, a post-deprivation remedy under state law may fulfill the requirements of due process. We have stated, however, that "[w]e apply *Parratt* and *Hudson* only when the state

What specific type of process must be afforded subcontractors is for the state to decide. We hold only that the state must provide for either a pre- or prompt post-deprivation hearing when withholding payments and assessing penalties.[10]

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administrative machinery did not and could not have learned of the deprivation until after it occurred, not when state officials acted pursuant to state policy and followed state procedures they believed were proper." *Knudson v. City of Ellensburg*, 832 F.2d 1142, 1149 (9th Cir. 1987) (internal quotations omitted). There is no question here, and the state does not contest, that the officials in this case acted pursuant to state policy and followed state procedures. Thus, Knudson forecloses the state's argument.

Moreover, even if *Parratt* and *Hudson* were applicable, they would not alter our conclusion because only prime contractors are granted the right to bring suit on the contract against the state. Subcontractors may sue only if the prime contractor is willing to assign them its right. Therefore, even if this right to sue could somehow be held to satisfy due process, it would not satisfy due process for the subcontractors who have no such independent right.

[10] Contrary to the state's concerns, our decision today does not affect the validity of the Davis-Bacon Act, 40 U.S.C. §§ 276a *et seq.*, upon which the California law was patterned, because the Davis-Bacon Act provides for an extensive hearing and appeal structure through its implementing regulations. Within 30 days after a withholding, either the prime contractor or the subcontractor may request an administrative hearing to review the findings of the Administrator of the Wage and Hour Division of the Department of Labor. 29 C.F.R. § 5.11. The findings and rulings of the administrator may be appealed to an administrative law judge ("ALJ"), whose decision may be appealed to the Wage Appeals Board. *Id.* Ultimately, the Board's decision may be appealed to the federal court. 5 U.S.C. § 704.

IV. Other Issues Raised by the State

The state asserts that G & G's summary judgment motion was premature and hence should have been denied. Federal Rule of Civil Procedure 56(a) allows a motion for summary judgment to be made any time more than twenty days after commencement of the action. G & G's motion complied with this rule and with the notice requirements under Local Rule 7.4.[11] Moreover, the state did not file a Rule 56(f) declaration indicating why it needed discovery and the facts it hoped to discover. Given the state's receipt of adequate notice and an opportunity to respond to the motion, and its failure to file a Rule 56(f) declaration, the district court did not err in considering the summary judgment motion.

The state also contends that the individual defendants in this case are entitled to qualified immunity. "Qualified immunity is an affirmative defense to *damage liability*; it does not bar actions for declaratory or injunctive relief." *American Fire, Theft & Collision Managers, Inc. v. Gillespie*, 932 F.2d 816, 818 (9th Cir. 1991) (internal quotation omitted) (emphasis added). Therefore, the individual defendants cannot claim qualified immunity as an affirmative defense to this action seeking declaratory and injunctive relief.

In addition, the district court did not err in denying the state's motion to dismiss. The state asserts that

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[11] G & G points out that it had filed essentially the same motion in a prior case, relying on the same authorities cited here. Thus, the state was aware of G & G's argument and the authorities on which it relied.

defects on the face of the complaint mandated its dismissal, but these alleged defects relate to issues such as standing, whether G & G was deprived of any constitutional right, and the qualified immunity defense. To the extent that we have decided all of these issues in G & G's favor, we affirm the district court's decision.

V. The Injunction

The district court's judgment declared seven separate provisions of the California Labor Code unconstitutional and enjoined the state from enforcing any of those provisions against G & G. The state argues that the injunction is overbroad, and we agree.

When a federal court holds that a constitutional violation has occurred, the nature of the remedy it grants must be determined by the nature and the scope of the constitutional violation. *Milliken v. Bradley*, 433 U.S. 267, 280 (1977); *see also Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established. . . . "). In devising a remedy for constitutional violations by state agencies or officials, the court "must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Id.*

The district court's injunction here was overbroad in two respects. First, by invalidating *all* California Labor Code provisions relating to the withholding procedure, the district court created a remedy beyond what was required to address the constitutional violation – the state's failure to provide subcontractors like G & G a pre-

or post-deprivation hearing as required by the Due Process Clause. Declaring the withholding provisions to be unconstitutional *as applied* is sufficient relief, as it allows the state to remedy the violation by adopting regulations providing for a pre- or post-deprivation hearing and to manage its own affairs in a manner consistent with the Constitution. *See Milliken*, 433 U.S. at 280.

Second, the district court issued a permanent injunction prohibiting the state from enforcing the withholding provisions against G & G. The sweeping nature of this relief suggests that even if the state were to provide G & G with an extensive hearing procedure, it still would be enjoined from penalizing G & G for noncompliance and noncooperation, from obtaining the disputed funds from the awarding body, and from disbursing back wages to underpaid workers even if G & G did not contest the withholding. In short, the district court has simply prohibited the state from enforcing the prevailing wage law against G & G. The appropriate course in this case, given all the circumstances, would be to enjoin the state from enforcing the withholding provisions against G & G unless within a reasonable period it chooses to adopt procedures that afford G & G and others either a pre- or post-deprivation hearing, and to specify the time within which the state must do so.

We vacate the district court's injunction and remand for a modification in the manner stated.

VI. Attorney Fees

In a companion appeal that has been submitted on the briefs and consolidated with this case, the state contests the district court's award of attorney fees to G & G following its grant of a permanent injunction in G & G's favor. Specifically, the state asserts that the district court abused its discretion in (1) determining that G & G was the prevailing party under 42 U.S.C. § 1988; (2) awarding attorney fees in light of G & G's alleged failure to satisfy the applicable criteria for such relief; and (3) awarding attorney fees to G & G for work performed in a previous lawsuit alleging identical claims for relief against the same defendants.

A. *Procedural History*

In December 1994, G & G filed a lawsuit entitled *G & G Fire Sprinklers, Inc. v. Juan Garza et al.*, No. CV-94-8542 R ("the *Garza* lawsuit"). G & G's claims in the *Garza* lawsuit were the same as those presented in this case. The *Garza* lawsuit ended in a settlement agreement providing that G & G could refile the lawsuit if the state took further action against G & G, which is precisely what happened. The state's further action – a subsequent notice to withhold – prompted G & G to file the present action.

After the district court's grant of the injunction, the state filed a motion to stay the judgment in this Court, which was denied by a motions panel. Next, the district court issued an attorney fees award totaling $25,830.28, which is the subject of this appeal. Subsequently, we reconsidered our previous denial of the motion to stay

the judgment, granted a stay pending appeal, and set the case for an early hearing on the merits.

B. *Prevailing Party*

The state argues that G & G is not a prevailing party under 42 U.S.C. § 1988 because while it received the relief it requested – an injunction – the staying of that injunction somehow nullified its legal effect or its mandate that the state alter its unlawful conduct. We reject this argument.

In *Farrar v. Hobby*, the Supreme Court held that to be considered a prevailing party, a plaintiff must "obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement." 506 U.S. 103, 111 (1992) (citations omitted). "In short, a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.* at 111-12.

Here, G & G obtained an injunction from the district court, which materially altered the legal relationship between the parties by prohibiting the state from depriving G & G of property without any hearing. Certainly that change benefitted G & G and it is the prevailing party. *See Herrington v. County of Sonoma*, 883 F.2d 739, 744 (9th Cir. 1989) (injunction, which appellate court upheld, rendered plaintiffs prevailing parties despite vacatur of damage award); *see also Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541, 543 (3d Cir. 1994) (plaintiff who has received injunctive relief has prevailed for purposes of section

1988). That a stay was issued after the district court's grant of the injunction does not alter G & G's status as the prevailing party in the district court, as the district court's judgment is a statement of the rights of the parties unless and until that judgment is altered by a higher court. We have decided not to do so.

C. *General Award of Fees*

The state also claims that the district court erroneously awarded attorney fees based solely on the declaration of Stephen A. Seideman ("Seideman declaration"), G & G's attorney in the district court.[12] More specifically, the state argues that the Seideman declaration fails to discuss many of the factors discussed in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975), to be considered by a district court in awarding attorney fees. These include: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment due to acceptance of the case; (5) the customary fee; (6) the contingent or fixed nature of the fee; (7) the limitations imposed by the client or the case; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability; (10) the undesirability of the case; (11) the nature of the professional relationship with the client; and (12) awards in similar cases.

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[12] The state does not dispute any specific items, such as the services provided or the hourly rate, or the total amount of fees; it simply asserts that G & G's evidence was not sufficient to support an award of fees.

A district court, however, need not discuss each and every factor separately in making its decision. Rather, a strong presumption exists that the lodestar (reasonable number of hours times reasonable hourly rate) represents a reasonable fee, and "many of these factors usually are subsumed" within the lodestar calculation. *Jordan v. Multnomah County*, 815 F.2d 1258, 1262 (9th Cir. 1987) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)). Thus, G & G only had to prove that its hourly rate was reasonable and that the total number of hours expended was reasonable. *See Dennis v. Chang*, 611 F.2d 1302, 1308 (9th Cir. 1980) (award of attorney fees properly granted where based solely on skill and experience of counsel, rates of compensation "typical" of those charged by attorneys for comparable service, and reasonable amount of time spent).

Nevertheless, we agree with the state that G & G did not satisfy its "burden of producing satisfactory evidence, *in addition to the affidavits of its counsel*, that the requested rates are in line with those prevailing in the community for similar services of lawyers of reasonably comparable skill and reputation." *Jordan*, 815 F.2d at 1263 (emphasis added). The only evidence in the record about the hourly rate is Mr. Seideman's statement in his declaration that "[t]he hourly rates which I billed Plaintiff are equal to or less than those generally billed by attorneys in Los Angeles for similar services," and a similar statement with regard to the paralegal's hourly rates. These statements constitute an "insufficient basis from which to conclude that the rates requested are 'reasonable.'" *Southerland v. International Longshoremen's and Warehousemen's Union*, 845 F.2d 796, 801 (9th Cir. 1987). Therefore,

while G & G certainly is entitled to fees, we remand to the district court the issue of whether the claimed hourly rates are reasonable. On remand, both G & G and the State should be allowed to supplement the record with additional evidence so that the district court can reevaluate the reasonableness of the fees requested.

In addition, we do not find persuasive the state's related argument that the California Division of Labor Standards Enforcement ("DLSE") and the Department of Industrial Relations were not made parties to the present suit until the First Amended Complaint on September 7, 1995 and hence should not be held accountable for any fees incurred prior to that time. We hold that these parties are jointly and severally liable for the fees, given that the work involved aided in the preparation of the case against all the defendants and the case was not one in which the claims against each defendant varied or one defendant was more culpable than another. *See Woods v. Graphic Communications*, 925 F.2d 1195, 1207 (9th Cir. 1991) (defendant liable for fees previously incurred where fees assisted in preparing case against defendant and served as developmental work for case).

D. *Award of Fees for Work Performed in Previous Lawsuit*

The state asserts that the district court should not have allowed G & G to recoup attorney fees from the *Garza* lawsuit given that it did not prevail in that lawsuit. We uphold the district court's decision.

In *Webb v. Board of Educ.*, 471 U.S. 234, 243 (1985), the Supreme Court affirmed a district court's decision to

deny attorney fees for time spent pursuing optional administrative remedies, specifically school board proceedings. But the Court noted that the petitioner in that case "made no suggestion below that any discrete portion of the work product from the administrative proceedings was work that was both useful and of a type ordinarily necessary to advance the civil rights litigation to the stage it reached before settlement," *id.*, suggesting that if that had happened, maybe the result would have been different. We followed the Supreme Court's lead in *Rock Creek Ltd. Partnership v. State Water Resources Control Bd.*, 972 F.2d 274, 279 (9th Cir. 1992), holding that a sponsor of a hydroelectric project was not entitled to attorney fees under §§ 1983 and 1988 for administrative proceedings before FERC. We reasoned that the FERC proceeding was not a condition precedent to plaintiff's entry to federal court, nor was it a part of a continuing federal court action. Because the FERC proceeding was not related or dependent, it could not form the basis for attorney fees. *Id.*

Cases from other circuits have addressed similar fee issues in non-administrative contexts. For example, the Third Circuit held in *Keenan v. City of Philadelphia*, 983 F.2d 459, 474 (3d Cir. 1992), that the district court did not abuse its discretion in including the time spent in labor arbitration in its fee calculation. It based its decision on the following interpretation of *Webb* by the Third Circuit: "[F]or the time spent pursuing optional administrative proceedings properly to be included in the calculation of a reasonable attorney's fee, the work must be 'useful and of a type ordinarily necessary' to secure the final result obtained from the litigation." *Pennsylvania v. Delaware*

Valley Citizens' Council for Clean Air, 478 U.S. 546, 561 (1986). In addition, the Eighth Circuit briefly addressed a similar situation in *Perkins v. Cross*, 728 F.2d 1099, 1100 (8th Cir. 1984), an action by picketers against municipal officials for violation of their civil rights. The court held that fees could be awarded for any "time the lawyer spent defending the plaintiffs in the original municipal court proceeding to the extent, if any, that research or investigation done in connection with that proceeding proved directly relevant to the successful prosecution of [their] later civil rights claims." *Id.*

Here, G & G made a showing that the work done in the *Garza* lawsuit was directly related to the present action – the allegations in that suit were identical to those made here. Counsel for G & G stated that the legal research and analysis performed in *Garza* were necessary for this action and accordingly saved him from expending more time on this lawsuit. Thus, unlike the *Rock Creek* case, the prior proceeding here was related to the present action. The two can even be viewed as a continuum of proceedings necessary to achieve the relief finally granted, given that the *Garza* case ended in a settlement stating that if the state took further action, G & G could refile the lawsuit, which is what happened. Moreover, caselaw reveals no requirement that a party must have prevailed in a prior proceeding to use that as a basis for attorney fees in another action.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART. Costs to Appellee G & G Fire Sprinklers, Inc.

KOZINSKI, Circuit Judge, dissenting.

In *San Bernardino Physicians' Services Medical Group v. County of San Bernardino*, 825 F.2d 1404 (9th Cir. 1987), we held that "[i]t is neither workable nor within the intent of section 1983 to convert every breach of contract claim against a state into a federal claim." *Id.* at 1408 (footnote omitted). While we recognized that any contract with the state gives rise to what could be characterized as a property interest, we held that this alone is not a basis for invoking the protections of due process. Rather, the interest in question must fall within a narrow category that might fairly be characterized as a civil right, *id.* at 1409, a right in public employment being the quintessential example. *Id.* (*citing Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972)). San Bernardino said that "construction contracts [and] purely material supply contracts" – contracts like the one we have here – do *not* create rights protected by the due process clause. *Id.* at 1410.

The majority abandons *San Bernardino's* nuanced framework in favor of a categorical approach that turns every right to receive payment on a public works contract into a property right protected by due process: "G & G's interest arises from its public works contract; it has a property interest in being paid in full for the construction work it has completed." Maj. op. at 1130. The opinion thus conflicts with *San Bernardino*, as well as the opinions of two other circuits. *See Mid-American Waste Systems, Inc. v. City of Gary*, 49 F.3d 286, 291 (7th Cir. 1995); *Walentas v. Lipper*, 862 F.2d 414, 418 (2d Cir. 1988); *S & D Maintenance Co. v. Goldin*, 844 F.2d 962, 966 (2d Cir. 1988).

It is also very bad policy. The state here is engaged in a commercial activity where it holds no special sway over

other parties by virtue of its regulatory powers. In carrying out its project, the state has bargained for the construction to be done according to plan, on schedule, and consistent with health and safety codes; these are ordinary terms just like the ones private parties put into their construction contracts. The state has also bargained for a more exotic term, namely that contractors and subcontractors pay a prevailing wage to their employees. While this differs from what ordinarily appears in private construction contracts, it is not an exercise of the state's regulatory power; rather, it is a term that any private party could equally well put into its contract. If the contractor or subcontractor doesn't like the term, he can refuse to do business with the state.[1]

Here the state determined that G & G did not comply with its prevailing wage obligation, and thus withheld payments. This is no different from a builder's refusal to make progress payments when he discovers (or believes he discovers) a failure of performance on any other term of a standard construction contract, for example, that the plumbing isn't up to code. Withholding payments under such circumstances is the standard remedy. If the subcontractor believes he has met his obligations, he may resort to his remedies under his contract with the general contractor who, in turn, may seek relief from the state or assign his right to do so to the subcontractor. It's a run-of-the-mill contract dispute just like thousands routinely handled by the state courts without federal intervention.

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[1] That the prevailing wage term appears in the California Labor Code doesn't matter. No one is forced to comply unless he agrees to do business with the state.

In lieu of this common sense solution – which also complies with binding precedent – the majority invokes the full panoply of federal due process, including the requirement of a hearing *before* the state may withhold payments for what it believes is defective performance under the contract. While the opinion addresses only the prevailing wage term, its logic carries much farther: If the state discovers any other type of breach – for example, failure to complete the project on time or to comply with applicable safety codes – it must provide an advance hearing before it may withhold payment. This gravely burdens the state's most potent remedy for dealing with recalcitrant contractors and subcontractors.[2] Why the state should be saddled with this yoke when it engages in the purely commercial activity of construction – a burden not suffered by private builders – is beyond me.[3] *San*

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[2] The right to a predeprivation hearing discourages states from cracking down on inefficient, incompetent and corrupt contractors, since such contractors remain on the job (with a right to continuing payment) until the hearing is completed. "Any gains the agency anticipated from terminating inefficient or incompetent contractors or from stopping a project that had lost its value to the state might be consumed by payments during the hearing process and related litigation." Leonard Kreynin, Note, Breach of Contract as a Due Process Violation: Can the Constitution Be a Font of Contract Law?, 90 Colum. L. Rev. 1098, 1099 (1990).

[3] We can't always expect the government to act with unbounded compassion, patience and generosity. Indeed, when the government is acting as a commercial entity, taxpayers cajole it to act with all the ferociousness the marketplace demands. Certain limits must always apply: The government cannot, for example, use public works contracts to discriminate on the basis of race or sex. But when the government bargains

Bernardino clearly teaches that commercial contract rights must be vindicated in state court using state remedies. By ignoring this teaching the majority creates not just an intra-circuit and inter-circuit conflict but also a wholly unwarranted burden on the thousands of states, counties, cities and special use districts governed by our law. Government is too unwieldy already; there is no justification for adding this heavy layer of red tape. I respectfully dissent.

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over the commercial terms of the contract it should enjoy the same ability as private builders to draw up the deal as it likes and seek the best price and the best terms the marketplace allows.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and DOES 1 through 20, Defendants.	) CIVIL NO. 95-4839 R) JUDGMENT) **The Honorable Manuel L. Real**) (Filed Nov. 9, 1995)

This action came on for hearing before the Court, on November 6, 1995, Honorable Manuel L. Real, District Judge Presiding, on a motion for summary judgment, and the evidence presented having been fully considered, the issues having been duly heard and a decision having been duly rendered.

It is ordered and adjudged that Plaintiff is awarded declaratory and injuntive relief against Defendants VICTORIA BRADSHAW; LLOYD W. AUBRY, JR.; DANIEL DELLAROCCA; ROGER MILLER; ROSA FRAZIER; DIVISION OF LABOR STANDARDS ENFORCEMENT; and DEPARTMENT OF INDUSTRIAL RELATIONS ("Defendants") as follows:

DECLARATORY RELIEF

1. California Labor Code §§1727, 1730-1733, 1775, 1776(g) and 1813 violate the due process clause of the Fourteenth Amendment to the United States Constitution and, therefore, are invalid.

2. The practice of Defendants of issuing notices to awarding bodies requiring the withholding of monies from contractors due to alleged violations of California prevailing wage laws is unconstitutional under the due process clause of the Fourteenth Amendment to the United States Constitution, and any such notices issued as to alleged violations by Plaintiff are invalid and of no force and effect.

INJUNCTION

3. Defendants are enjoined from applying or enforcing California Labor Code §§1727, 1730-1733, 1775, 1776(g) and 1813 against Plaintiff or on account of alleged violations by Plaintiff of California prevailing wage laws (i. e., *Cal. Labor Code* §§1720-1861).

Plaintiff shall recover costs of suit.

DATED: Nov -7 1995, 1995

MANUEL L. REAL
THE HONORABLE MANUEL L. REAL
JUDGE OF THE UNITED STATES
DISTRICT COURT, CENTRAL DISTRICT

NOT FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

G & G FIRE SPRINKLERS, INC.,	)	No. 95-56639
Plaintiff-Appellee,	)	D.C. No. CV-95-04839-MLR (Central California)
v.	)	
VICTORIA L. BRADSHAW, an individual, in her capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., Director; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual in her capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and DOES 1 through 20,	)	ORDER
Defendants-Appellants.	)	(Filed Oct. 28, 1998)

Before: REINHARDT, KOZINSKI and HAWKINS, Circuit Judges.

A majority of the panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Kozinski has voted to grant the petition for rehearing and to accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has called for a vote to rehear this matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

G & G FIRE SPRINKLERS, INC., Plaintiff, vs. VICTORIA BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy	)	CIVIL NO. 95-4839 ER (BQRx) FIRST AMENDED COMPLAINT FOR: 1. DECLARATORY RELIEF (UNCONSTITUTIONAL APPLICATION OF STATE LAWS) 42 U.S.C. § 1983, 28 U.S.C. § 2201 2. DECLARATORY RELIEF (FACIAL UNCONSTITUTIONALITY OF STATE LAWS)

Labor Commissioner of the State of California; ROGER MILLER, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California; and Does 1 through 20, Defendants.	)	3. INJUNCTION 42 U.S.C. § 1983 28 U.S.C. § 2202 AND DEMAND FOR TRIAL BY JURY

Plaintiff, G & G FIRE SPRINKLERS, INC., ("Plaintiff") alleges:

FIRST CLAIM FOR RELIEF

(Declaratory Relief)

1. Jurisdiction of this action is conferred on this United States District Court by the provisions of 42 U.S.C.

§ 1983, 28 U.S.C. § 1343(a)(4), and 28 U.S.C. § 2201-2202 inasmuch as this action is to redress a deprivation of civil and constitutional rights guaranteed by the Fourteenth Amendment to the United States Constitution by persons acting under color of state law, to secure a declaration of rights to an actual controversy concerning the unconstitutional application of certain California Labor Code provisions to Plaintiff by Defendants, and Plaintiff's assertions concerning the facial unconstitutionality of those provisions, and to restrain and enjoin Defendants from enforcing the unconstitutional provisions in the future.

2. Venue of this action is proper in this Court under the provisions of 28 U.S.C. § 1391(b) inasmuch as Defendants, or some of them, are either residents of or maintain official offices and places of business within the judicial district of this Court, the United States District Court, Central District of California. Further, Plaintiff conducts business within the county of Los Angeles, California, within this judicial district, and Defendants' conduct alleged herein has affected Plaintiff at its offices and its construction projects located within the judicial district of this Court.

3. Plaintiff is now, and at all times herein mentioned has been, a corporation organized and existing under and by virtue of the laws of the State of California, which does business in, among other places, Los Angeles, California, County of Los Angeles, and with its principal place of business in Culver City, County of Los Angeles, California. Plaintiff is now, and at all times herein mentioned has been, engaged in business as a fire protection contractor duly licensed under the laws of the State of California.

4. (a) Defendant VICTORIA BRADSHAW ("BRADSHAW") is, and at all times herein mentioned has been, Chief of the Division of Labor Standards Enforcement ("DLSE"), (also known as the Labor Commissioner) Department of Industrial Relations, State of California, and, as such, is the public of officer of the State of California responsible for enforcement of the State's "prevailing wage and apprenticeship" laws *(California Labor Code* §§ 1720-1815).

(b) Defendant BRADSHAW is sued herein in her official capacity, and is a "person" amenable to suit within the meaning of 42 U.S.C. § 1983.

5. (a) Defendant LLOYD W. AUBRY, JR. ("AUBRY") is, and at all times herein mentioned has been, Director of the Department of Industrial Relations, State of California, and as such is the public executive officer of the State of California responsible for the overall interpretation and enforcement of the State of California's wage and hour laws, including the "prevailing wage and apprenticeship" laws.

(b) Defendant AUBRY is sued herein in his official capacity, and is a "person" amenable to suit within the meaning of U.S.C. § 1983.

6. (a) Defendant DANIEL DELLAROCCA ("DELLAROCCA") is, and at all times herein mentioned has been, a Deputy Labor Commissioner of the Division of Labor Standards Enforcement (hereinafter "DLSE"), Department of Industrial Relations, State of California, a public officer of the State of California, and, as such, is

one of the public officers of the state of California responsible for enforcement of the State's "prevailing wage and apprenticeship" laws.

(b) Defendant DELLAROCCA is sued herein in his official capacity, and is a "person" amenable to suit within the meaning of 42 U.S.C. § 1983.

7. (a) Defendant ROGER MILLER ("MILLER") is, and at all times herein mentioned has been, a regional manager and/or Senior Deputy Labor Commissioner of the Division of Labor Standards Enforcement ("DLSE"), Department of Industrial Relations, State of California, a public officer of the State of California, and, as such, is one of the public officers of the State of California responsible for enforcement of the State's "prevailing wage and apprenticeship" laws.

(b) Defendant MILLER is sued herein in his official capacity, and is a "person" amenable to suit within the meaning of 42 U.S.C. § 1983.

8. (a) Defendant ROSA FRAZIER ("FRAZIER") is, and at all times herein mentioned has been, a regional manager and/or Senior Deputy Labor Commissioner of the Division of Labor Standards Enforcement ("DLSE"), Department of Industrial Relations, State of California, a public officer of the State of California, and, as such, is one of the public officers of the State of California responsible for enforcement of the State's "prevailing wage and apprenticeship" laws.

(b) Defendant FRAZIER is sued herein in her official capacity, and is a "person" amenable to suit within the meaning of 42 U.S.C. § 1983.

9. Defendants MILLER, FRAZIER, BRADSHAW and AUBRY, and each of them, maintain offices and do business throughout the State of California, and maintain offices and do business in Los Angeles, County of Los Angeles, State of California.

10. Defendant DIVISION OF LABOR STANDARDS ENFORCEMENT ("DLSE"), is, and at all times herein mentioned has been, an agency of the State of California.

11. Defendant DEPARTMENT OF INDUSTRIAL RELATIONS ("DIR") is, and at all times herein mentioned as been, an agency of the State of California.

12. Defendants DLSE and DIR, and each of them, maintain offices and do business throughout the State of California, and maintain offices and do business in Los Angeles, County of Los Angeles, State of California.

13. Plaintiff is ignorant of the true names and capacities of the defendants sued herein as Does 1 through 20, inclusive, and therefore sues the defendants by such fictitious names.

14. Plaintiff has performed work both as a subcontractor and prime contractor on various public works projects which are subject to the prevailing wage requirements set forth in the California Labor Code.

15. Plaintiff intends to continue performing work on public works projects in California as a subcontractor and prime contractor.

16. Defendants, acting under color of California Labor Code §§ 1727-1731, 1774, 1775, 1777.5 and 1815, issued Notices of Wages owed, Notices of Penalty Assessments, and Notices to Withhold (hereinafter referred to

collectively as the "Notices"), to awarding bodies of the prime contracts on public works projects on account of the alleged failure of Plaintiff to pay prevailing wages, including fringe benefits and apprenticeship-training fees, and to have otherwise complied with the prevailing wage and apprenticeship laws. Defendants also issued a Notice of Penalty Assessment purportedly pursuant to Cal. Labor Code § 1776. The Notice of Penalty Assessment was issued without prior notice.

17. Prior to issuing the Notices mentioned in Paragraph 16, above, Defendants did not provide Plaintiff, or the Prime Contractors who employed Plaintiff with any hearing with respect to the allegations or potential forfeitures or penalties, or with respect to the reasons for them, or with respect to the total of the alleged amounts due.

18. The amount presently withheld as a result of such notices is more than $135,000.

19. The awarding bodies continue to withhold not less than $135,000 from the Prime Contractors who employed Plaintiff, on account of the Notices.

20. None of Defendants have provided, or offered to provide, Plaintiff or any of the Prime Contractors either a pre-deprivation or post-deprivation hearing on the claims involved.

21. California Labor Code § 1729 provides:

> "1729. It shall be lawful for any contractor to withhold from any subcontractor under him sufficient sums to cover any penalties withheld from him by the awarding body on account of the subcontractor's failure to comply with the terms of this chapter, and if payment has already been made to the subcontractor the contractor may recover from him the amount of the penalty or forfeiture in a suit at law."

The Prime Contractors for the Projects have withheld from Plaintiff not less than $135,000 due to the withholding from said Prime Contractors of monies due to the Notices.

22. Defendants stated to Plaintiff that there is no right to a pre-deprivation hearing. Defendants stated to Plaintiff that Labor Code § 1732 provides that a lawsuit by the contractor or his assignee pursuant to Labor Code § 1731 et seq. is the exclusive remedy of the contractor or his assignee with regard to wages and/or penalties withheld. Plaintiff has been deprived of the sum of not less than $135,000 in earned progress payments due it under its contracts for the Projects.

23. There was no hearing held prior to the issuance of any of the Notices. There is no procedure for a prompt post-withholding hearing with regard to such notices to withhold. There is no requirement that Defendants ever carry any burden to justify the issuance of a notice to withhold. There is no procedure to protect against the issuance of notices to withhold in an excessive amount, resulting in withholding of excessive amounts of money.

24. The issuances of the notices to withhold by DLSE are not necessary to the implementation or enforcement of the prevailing Wage laws. There are no emergency circumstances which necessitate the issuance of notices to withhold without a hearing and/or other reasonable and appropriate procedures.

25. The notices to withhold issued by the DLSE on account of alleged violations by Plaintiff at the above mentioned projects are wrongful, incorrect, and excessive, and were issued arbitrarily and unreasonably.

26. The issuance of the notices to withhold caused Plaintiff to be deprived of property in the form of substantial sums of money as the statutory provisions purported to be enforced by DLSE provide that upon the withholding of money from a prime contract by an awarding body, the contractor may withhold said money from the subcontractor. Thus, the notices to withhold issued by the DLSE were intended to, and did, cause Plaintiff to suffer a deprivation of property.

27. By the acts and conduct set forth above, Defendants have deprived Plaintiff of its property without due process of law in contravention of Section 1 of the Fourteenth Amendment to the U.S. Constitution. Plaintiff is informed and believes and thereupon alleges that Defendants so deprived Plaintiff with knowledge that their actions were in violation of the U.S. Constitution. A reasonable person with knowledge of the facts and information known and available to Defendants would know that the actions as hereinabove alleged were unconstitional.

28. There is now existing between Plaintiff on the one hand, and Defendants, and each of them, on the other hand, an actual, justiciable controversy with respect to which Plaintiff is entitled to have a declaration of its rights and equitable relief, because of the facts, conditions, and circumstances set forth above.

29. (a) Plaintiff is entitled to a declaration of its rights declaring the acts of Defendants, and each of them, have

been and are invalid, illegal, and in deprivation of Plaintiff's due process and property rights guaranteed by the Section 1 of the Fourteenth Amendment to the Constitution of the United Sates, that the Notices are invalid and of no legal effect.

(b) Plaintiff has been required to employ attorneys to vindicate its belief that the provisions of the California Labor Code set forth herein are unconstitutional on their face and as applied, and to prosecute this action, and is entitled to an award of attorney's fees pursuant to the provisions of 42 U.S.C. § 1988.

SECOND CLAIM FOR RELIEF

(Declaratory Relief)

(Facial Unconstitutionality of State Laws)

30. Plaintiff realleges and incorporates by this reference herein each and every allegation contained in paragraphs 1 through 29 of the First Claim for Relief as though fully set forth herein.

31. (a) Insofar as is relevant herein, *California Labor Code* §§ 1727, 1730, 1732, 1733, 1775, and 1776(g), provide:

§ 1727. Withholding of Forfeited Sums

"Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all wages and penalties which have been forfeited pursuant to any stipulation in a contract for public work, and the terms of this chapter. But no sum shall be withheld, retained or forfeited, except from the final Payment,

without a full investigation by either the Division of Labor Standards Enforcement or by the awarding body. (1937 ch. 90, 1431, 1992 ch. 1342)"

§ 1730. Transfer of Wages and Penalties to Labor Commissioner

"Every awarding body shall transfer all wages and penalties that have been withheld pursuant to Section 1727 to the Labor Commissioner, for disbursement pursuant to Section 1775, whenever a contractor fails to bring a suit against the awarding body for recovery of wages and penalties that are withheld pursuant to Section 1727 within 90 days after the completion of the contract and formal acceptance of the job. (1992 ch. 1342)"

§ 1733. Recovery of Wages and Penalties – Suit

"Suit may be brought by the contractor or his or her assignee without permission from the state or other authority and is limited to the recovery of the wages and penalties without prejudice to the contractor's or assignees rights in regard to other matters affecting the contract. No other issues shall be presented to the court in the case and the burden shall be on the contractor or his or her assignee to establish his or her right to the wages or penalties withheld. The Division of Labor Standards Enforcement may intervene in any court proceeding brought pursuant to this section. In case the action is not commenced and actual notice thereof received by the awarding body within the 90-day period, the action shall be dismissed on motion of the awarding body or the Division of Labor Standards Enforcement.

The Division of Labor Standards Enforcement may, upon written request of any awarding body, assist in the defense of the action. (1937 ch. 90, 1957 Ch. 398, 1988 ch. 160, 1992 ch. 1342)"

§ 1775. Payment Less Than Stipulated Rate – Penalty

"The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or by any subcontractor under him or her. the amount of this penalty shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part."

§ 1776. Payroll records; retention; inspection; noncompliance penalties; rules and regulations

"(g) The contractor shall have 10 days in which to comply subsequent to receipt of written notice specifying in what respects the contractor must comply with this section. In the event that

> the contractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due."

(b) On their face, Sections 1727, 1729, 1730, 1732, 1733, 1775 and 1776, deny and deprive persons of their property without due process of law in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, inasmuch as said Sections authorize the deprivation of property without notice or hearing, and provide for the imposition of penalties and forfeitures without notice or hearing.

(c) Defendants presently maintain a policy and practice pursuant to *California Labor Code* §§ 1720-1815 which authorizes the withholding of monies from contractors and Subcontractors who perform services on Public Works Projects, as well as the imposition of penalties and forfeitures, without providing such contractors and Subcontractors any prior notice or prior hearing for alleged violations of said sections.

(d) plaintiff has been required to employ attorneys to vindicate its belief that the provisions of the California Labor Code set forth herein are unconstitutional on their face and as applied, and is entitled to an award of attorney's fees pursuant to the provisions of 42 U.S.C. § 1988.

THIRD CLAIM FOR RELIEF

(Injunction)

32. Plaintiff realleges and incorporates by this reference herein each and every allegation contained in paragraphs 1 through 31 above as though fully set forth herein.

33. The actions and conduct or Defendants have caused plaintiff to suffer great and irreparable injury and unless the Court issues relief by way of a Temporary Restraining order, Preliminary and Permanent Injunction, Plaintiff and other contractors will suffer great and irreparable injury in that Plaintiff and other contractors will (1) be deprived of its property without due process of law; (2) be liable for civil penalties and back wage forfeitures; (3) be required to expend time and money; and (4) be exposed to unfavorable publicity which will injure its reputation as a reputable construction firm resulting in loss of business.

34. Plaintiff does not have an adequate remedy at law because (1) the pecuniary damages which it might suffer are presently difficult or impossible to fully ascertain; and (2) the irreparable injury to plaintiff's reputation cannot be fully compensated by money damages. Further, since the provisions of the California Labor Code set forth herein are unconstitutional on their face, as well as in application to plaintiff, Defendants' conduct in continuing to maintain and enforce such unconstitutional provisions entitles Plaintiff to injunctive relief to enjoin such provisions.

35. Plaintiff has been required to employ attorneys to vindicate its belief that the provisions of the California

Labor Code set forth herein are unconstitutional on their face and as applied, and is entitled to an award of attorney's fees pursuant to the provisions of 42 U.S.C. § 1988.

PRAYER

WHEREFORE, Plaintiff prays for judgment as follows:

1. **ON ITS FIRST CLAIM FOR RELIEF:**

   a. For a Declaration Of Rights in Plaintiff's favor that as applied to Plaintiff, *California Labor Code* §§ 1720-1815 are unconstitutional as a violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and that the Notices are invalid and of no legal effect;

   b. For Costs of Suit;

   c. For Attorneys' Fees pursuant to Section 42 U.S.C. 1988;

   d. For such other relief as is just and proper.

2. **ON ITS SECOND CLAIM FOR RELIEF:**

   a. For a Declaration Of Rights in Plaintiff's favor that on their face, *California Labor Code* §§ 1727, 1729, 1730, 1732, 1733, 1775 and 1776 are unconstitutional as a violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States;

   b. For Costs of Suit;

   c. For Attorneys' Fees pursuant to Section 42 U.S.C. 1988;

   d. For such other relief as is just and proper.

3. **ON ITS THIRD CLAIM FOR RELIEF:**

   a. For a Temporary Restraining Order, Preliminary and Permanent Injunction enjoining Defendants, and each of them, and their agents, employees, attorneys, representatives, as well as all those persons acting in active concert or participation with them, including representatives of the awarding bodies from enforcing, or threatening to enforce, the provisions of *California Labor Code* §§ 1727, 1729, 1775 or 1776 against Plaintiff, or any other person, with regard to any "public works" project, including, without limitation, imposing, or threatening to impose, civil penalties against any person, including Plaintiff; issuing Notices to Withhold with regard to Plaintiff and/or any other person;

   b. For Costs of Suit;

   c. For Attorneys' Fees pursuant to Section 42 U.S.C. 1988;

   d. For such other relief as is just and proper.

DATED: September 6, 1995

LEVIN, STEIN, CHYTEN & SCHNEIDER

By: /s/ Stephen A. Seideman
Stephen A. Seideman, Esq.
Attorneys for Plaintiff
G & G FIRE SPRINKLERS, INC.

DEMAND FOR TRIAL BY JURY

Plaintiff hereby demands trial by jury.

DATED: September 6, 1995

LEVIN, STEIN, CHYTEN & SCHNEIDER

By: /s/ Stephen A. Seideman
Stephen A. Seideman, Esq.
Attorneys for Plaintiff
G & G FIRE SPRINKLERS, INC.

Cal. Labor Code § 172[redacted]

§ 1720. Public Works -- Defined

As used in this chapter, "public works" means:

(a) Construction, alteration, demolition, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority.

(b) Work done for irrigation, utility, reclamation, and improvement districts, and other districts of this type. "Public work" shall not include the operation of the irrigation or drainage system of any irrigation or reclamation district, except as used in Section 1778 relating to retaining wages.

(c) Street, sewer, or other improvement work done under the direction and supervision or by the authority of any officer or public body of the state, or of any political subdivision or district thereof, whether the political subdivision or district operates under a freeholder's charter or not.

(d) The laying of carpet done under a building lease-maintenance contract and paid for out of public funds.

(e) The laying of carpet in a public building done under contract and paid for in whole or part out of public funds.

(f) Public transportation demonstration projects authorized pursuant to Section 143 of the Streets and Highways Code.

Cal. Labor Code § 1727

§ 1727. Withholding of Forfeited Sums

Before making payments to the contractor of money due under a contract for public work, the awarding body shall withhold and retain therefrom all wages and penalties which have been forfeited pursuant to any stipulation in a contract for public work, and the terms of this chapter. But no sum shall be withheld, retained or forfeited, except from the final payment, without a full investigation by either the Division of Labor Standards Enforcement or by the awarding body.

Cal. Labor Code § 1729

§ 1729. Withholding of Penalties from Subcontractor

It shall be lawful for any contractor to withhold from any subcontractor under him sufficient sums to cover any penalties withheld from him by the awarding body on account of the subcontractor's failure to comply with the terms of this chapter, and if payment has already been made to the subcontractor the contractor may recover from him the amount of the penalty or forfeiture in a suit at law.

Cal. Labor Code § 1730

§ 1730. Transfer of Wages and Penalties to Labor Commissioner

Every awarding body shall transfer all wages and penalties that have been withheld pursuant to Section 1727 to the Labor Commissioner, for disbursement pursuant to Section 1775, whenever a contractor fails to bring

a suit against the awarding body for recovery of wages and penalties that are withheld pursuant to Section 1727 within 90 days after the completion of the contract and formal acceptance of the job.

Cal. Labor Code § 1731

§ 1731. Suit Against Awarding Body – Wages and Penalties Retained

If suit is brought against the awarding body within the 90-day period and formal notice thereof is given to the awarding body within the 90-day period either by service of summons or by registered mail which is received within the 90-day period, the wages and penalties shall be retained by the awarding body pending the outcome of the suit, and be forwarded to the Labor Commissioner for disbursement pursuant to Section 1775 if the contractor does not prevail in the action. Wages for workers who cannot be located shall be placed in the Industrial Relations Unpaid Wage Fund and held in trust for the workers pursuant to Section 96.7. Penalties shall be paid into the General Fund.

Cal. Labor Code § 1732

§ 1732. Recovery of Wages or Penalties – Time for Action

Notwithstanding any other provision of law, the time for action by the contractor or his or her assignee for the recovery of wages or penalties is limited to the 90-day period and suit on the contract for alleged breach thereof in not making the payment is the exclusive remedy of the

contractor or his or her assignees with reference to those wages or penalties.

Cal. Labor Code § 1733

§ 1733. Recovery of Wages and Penalties – Suit

Suit may be brought by the contractor or his or her assignee without permission from the state or other authority and is limited to the recovery of the wages and penalties without prejudice to the contractor's or assignee's rights in regard to other matters affecting the contract. No other issues shall be presented to the court in the case and the burden shall be on the contractor or his or her assignee to establish his or her right to the wages or penalties withheld. The Division of Labor Standards Enforcement may intervene in any court proceeding brought pursuant to this section. In case the action is not commenced and actual notice thereof received by the awarding body within the 90-day period, the action shall be dismissed on motion of the awarding body or the Division of Labor Standards Enforcement.

The Division of Labor Standards Enforcement may, upon written request of any awarding body, assist in the defense of the action.

Cal. Labor Code § 1771

§ 1771. Prevailing Per Diem Wage Required

Except for public works projects of one thousand dollars ($1,000) or less, not less that the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and

not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works.

This section is applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. This section is applicable to contracts let for maintenance work.

Cal. Labor Code § 1772

§ 1772. Workers Employed Upon Public Work

Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work.

Cal. Labor Code § 1773

§ 1773. Adoption of Prevailing Per Diem Wage

The body awarding any contract for public work, or otherwise undertaking any public work, shall obtain the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality in which the public work is to be performed for each craft, classification or type of workman needed to execute the contract from the Director of the Department of Industrial Relations. The holidays upon which such rates shall be paid need not be specified by the awarding body, but shall be all holidays recognized in the collective bargaining agreement applicable to the particular craft, classification or type of workman employed on the project.

In determining such rates, the Director of the Department of Industrial Relations shall ascertain and consider the applicable wage rates established by collective bargaining agreements and such rates as may have been predetermined for federal public works, within the locality and in the nearest labor market area. Where such rates do not constitute the rates actually prevailing in the locality, the director shall obtain and consider further data from the labor organizations and employers or employer associations concerned, including the recognized collective bargaining representatives for the particular craft, classification or type of work involved. The rate fixed for each craft, classification or type of work shall be not less than the prevailing rate paid in such craft, classification or type of work.

If the director determines that the rate of prevailing wage for any craft, classification or type of workman is the rate established by a collective bargaining agreement, the director may adopt such rate by reference as provided for in such agreement and such determination shall be effective for the life of such agreement or until the director determines that another rate should be adopted.

Cal. Labor Code § 1773.2

§ 1773.2. Call for Bids – Specification of Wage Rates

The body awarding any contract for public work, or otherwise undertaking any public work, shall specify in the call for bids for the contract, and in the bid specifications and in the contract itself, what the general rate of per diem wages is for each craft, classification, or type of worker needed to execute the contract.

In lieu of specifying the rate of wages in the call for bids, and in the bid specifications and in the contract itself, the awarding body may, in the call for bids, bids specifications, and contract, include a statement that copies of the prevailing rate of per diem wages are on file at its principal office, which shall be made available to any interested party on request. The awarding body shall also cause a copy of the determination of the director of the prevailing rate of per diem wages to be posted at each job site.

Cal. Labor Code § 1774

§ 1774. Specified Prevailing Wage – Must Be Paid

The contractor to whom the contract is awarded, and any subcontractor under him, shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract.

Cal. Labor Code § 1775, at all relevant times herein. This version of § 1775 was operative prior to January 1, 1998. (An amended version of this statute, reprinted below, became effective on January 1, 1998)

§ 1775. Payment Less Than Stipulated Rate – Penalty

The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or by any subcontractor under him or her.

The amount of this penalty shall be determined by the Labor Commissioner and shall be based on consideration of the contractor's mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages, or the previous record of the contractor in meeting his or her prevailing wage obligations, or a contractor's willful failure to pay the correct rates of prevailing wages. A mistake, inadvertance, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

To the extent that there is insufficient money due a contractor to cover all penalties and amounts due in accordance with this section, or in accordance with Section 1813, and in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the Division of Labor Standards Enforcement, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction to recover the penalties and the amounts due provided in this section. This action shall be commenced not later than 90 days after the filing of a valid notice of completion in the office of the county recorder in each county in

which the public work or some part thereof was performed, or not later than 90 days after acceptance of the public work, whichever last occurs. No issue other than that of the liability of the contractor for the penalties allegedly forfeited and amounts due shall be determined in the action, and the burden shall be upon the contractor to establish that the penalties and amounts demanded in the action are not due.

Out of any money withheld, recovered, or both, there shall first be paid the amount due each worker, and if insufficient funds are withheld, recovered, or both, to pay each worker in full, the money shall be prorated among all workers.

Cal. Labor Code § 1775, as currently amended, effective January 1, 1998.

§ 1775. Payment Less Than Stipulated Rate – Penalty

(a) The contractor and any subcontractor under him or her shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by him or her or, except as provided in subdivision (b), by any subcontractor under him or her. The amount of this penalty shall be determined by the Labor Commissioner and shall be based on consideration of the mistake, inadvertence, or neglect of the contractor or subcontractor in failing to pay the correct rate of prevailing wages, or the previous

record of the contractor in meeting his or her prevailing wage obligations, or the willful failure by the contractor or subcontractor to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rate of prevailing wages is not excusable if the contractor or subcontractor had knowledge of his or her obligations under this part. The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the contractor or subcontractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

(b) If a worker employed by a subcontractor on a public works project is not paid the general prevailing per diem wages by the subcontractor, the prime contractor of the project is not liable for any penalties under subdivision (a) unless the prime contractor had knowledge of that failure of the subcontractor to pay the specified prevailing rate of wages to those workers or unless the prime contractor fails to comply with all of the following requirements:

(1) The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of sections 1771, 1775, 1776, 1777.5, 1813, and 1815.

(2) The contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees, by periodic review of the certified payroll records of the subcontractor.

(3) Upon becoming aware of the failure of the subcontractor to pay his or her workers the specified prevailing rate of wages, the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on the public works project.

(4) Prior to making final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages to his or her employees on the public works project and any amounts due pursuant to Section 1813.

(c) The Division of Labor Standards Enforcement shall notify the contractor on a public works project within 15 days of the receipt by the Division of Labor Standards Enforcement of a complaint of the failure of a subcontractor on that public works project to pay workers the general prevailing rate of per diem wages. If the Division of Labor Standards Enforcement determines that employees of a subcontractor were not paid the general prevailing rate of per diem wages and if the body awarding the contract under which the employees performed work did not retain sufficient money under the contract to pay those employees the balance of wages owed under the general prevailing rate of per diem wages, the contractor shall withhold an amount of moneys due the subcontractor sufficient to pay those employees the general prevailing rate of per diem wages if requested by the Division of Labor Standards Enforcement. The contractor shall pay any money retained from

and owed to a subcontractor upon receipt of notification by the Division of Labor Standards Enforcement that the wage complaint has been resolved. If notice of the resolution of the wage complaint has not been received by the contractor within 180 days of the filing of a valid notice of completion or acceptance of the public works project, whichever occurs later, the contractor shall pay all moneys retained from the subcontractor to the awarding body. The moneys shall be retained by the awarding body pending the final decision of an enforcement action, and be forwarded to the Labor Commissioner for disbursement pursuant to subdivision (d) if the subcontractor does not prevail in the action. Wages for workers who cannot be located after a diligent search by the Labor Commissioner shall be deposited in the Industrial Relations Unpaid Wage Fund pursuant to subdivision (c) of Section 96.7. Penalties shall be paid into the General Fund.

If the subcontractor prevails in the enforcement action, the awarding body shall release any funds retained pursuant to this subdivision to the contractor within 10 working days from the date of the final decision of the court.

(d) To the extent that there is insufficient money due a contractor to cover all penalties and amounts due in accordance with this section or Section 1813, and in all cases where the contract does not provide for a money payment by the awarding body to the contractor, the awarding body shall notify the Division of Labor Standards Enforcement of the violation and the division, if necessary with the assistance of the awarding body, may maintain an action in any court of competent jurisdiction

to recover the penalties and the amounts due provided in this section. This action shall be commenced not later than 180 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 180 days after acceptance of the public work, whichever last occurs. No issue other than that of the liability of the contractor and subcontractor for the penalties allegedly forfeited and amounts due shall be determined in the action, and the burden shall be upon the contrator and subcontractor to establish that the penalties and amounts demanded in the action are not due. The contractor and subcontractor shall be jointly and severally liable in an enforcement action for any wages due. Following entry of a judgment for joint and several liability, the division shall first exhaust all reasonable remedies to collect the amount due from the subcontractor before pursuing the claim for wages against the contractor. From the amount collected from the subcontractor, the wage claim shall be satisfied prior to the amount being applied to penalties.

Out of any money withheld, recovered, or both, there shall first be paid the amount due each worker, and if insufficient funds are withheld, recovered, or both, to pay each worker in full, the money shall be prorated among all workers.

(e) This section shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date.

Cal. Labor Code § 1776, in part, at all relevant times herein. This version of § 1776 was operative prior to January 1, 1998. (An amended version of this statute, reprinted below, became effective on January 1, 1998.)

§ 1776. Payroll Records Required

(a) Each contractor and subcontractor shall keep an accurate payroll record, showing the name, address, social security number, work classification, and straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work.

(b)

* * *

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

* * *

(d) Each contractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request.

* * *

(g) The contractor shall have 10 days in which to comply subsequent to receipt of written notice specifying in what respects the contractor must comply with this

section. In the event that the contractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due.

(h) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. These stipulations shall fix the responsibility for compliance with this section on the prime contractor.

* * *

* * *

Cal. Labor Code § 1776, in part, as currently amended, effective January 1, 1998.

§ 1776. Payroll Records Required

(a) Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty or perjury, stating . . .

(1) The information contained in the payroll record is true and correct.

* * *

(b)(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

* * *

(d) A contractor or subcontractor shall file a certified copy of the records enumerated in subdivision (a) with the entity that requested the records within 10 days after receipt of a written request.

* * *

(g) The contractor or subcontractor shall have 10 days in which to comply subsequent to receipt of a written notice requesting the records enumerated in subdivision (a). In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due. A contractor is not subject to a penalty assessment pursuant to this section due to the failure of a subcontractor to comply with this section.

(h) The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section.

* * *

Cal. Labor Code § 1813, at all relevant times herein. This version of § 1813 was operative prior to January 1, 1998. (An amended version of this statute, reprinted below, became effective on January 1, 1998.)

§ 1813. Working Hours Violations – Penalty

The contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each workman employed in the execution of the contract by the contractor or by any subcontractor for each calendar day during which such workman is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. In awarding any contract for public work, the awarding body shall cause to be inserted therein a stipulation to this effect. The awarding body shall take cognizance of all violations of this article committed in the course of the execution of the contract, and shall report them to the officer of the state or political subdivision who is authorized to pay the contractor money due him under the contract.

Cal. Labor Code § 1813, as currently amended, effective January 1, 1998.

§ 1813. Working Hours Violations – Penalty

The contractor or subcontractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each worker employed in the execution of the contract by the respective contractor or subcontractor for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. In awarding any contract for public work, the awarding body shall cause to be inserted in the contract a stipulation to this effect. The awarding body shall take cognizance of all violations of this article committed in the course of the execution of the contract, and shall report them to the Division of Labor Standards Enforcement.

This section shall remain in effect only until January 1, 2003, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2003, deletes or extends that date.

Cal. Civil Code §3103

§3103. Stop Notice

"Stop notice" means a written notice, signed and verified by the claimant or his or her agent, stating in general terms all of the following:

(a) The kind of labor, services, equipment, or materials furnished or agreed to be furnished by such claimant.

(b) The name of the person to or for whom the same was done or furnished.

(c) The amount in value, as near as may be, of that already done or furnished and of the whole agreed to be done or furnished.

(d) The name and address of the claimant.

* * *

The notice, in the case of any public work for the state, shall be filed with the director of the department which let the contract and, in the case of any other public work, shall be filed in the office of the controller, auditor, or other public disbursing officer whose duty it is to make payments under the provisions of the contract, or with the commissioners, managers, trustees, officers, board of supervisors, board of trustees, common council, or other body by whom the contract was awarded. No stop notice shall be invalid by reason of any defect in form if it is sufficient to substantially inform the owner of the information requested.

Any stop notice may be served by registered or certified mail with the same effect as by personal service.

Cal. Civil Code §3181

§3181. Persons Entitled to Serve Stop Notices

Except for an original contractor, any person mentioned in Section 3110, 3111, or 3112, or in Section 4107.7 of the Public Contract Code, or furnishing provisions, provender, or other supplies, may serve a stop notice upon the public entity responsible for the public work in accordance with this chapter.

Cal. Civil Code §3184

§3184. Time Limit for Effective Service of Stop Notice

To be effective, any stop notice pursuant to this chapter must be served before the expiration of:

(a) Thirty days after the recording of a notice of completion (sometimes referred to in public works as a notice of acceptance) or notice of cessation, if such notice is recorded.

(b) If no notice of completion or notice of cessation is recorded, 90 days after completion or cessation.

Cal. Civil Code §3186

§3186. Duty to Withhold – Amount Sufficient to Answer Claim and Litigation Costs

It shall be the duty of the public entity, upon receipt of a stop notice pursuant to this chapter, to withhold from the original contractor, or from any person acting under his or her authority, money or bonds (where bonds are to be issued in payment for the work of improvement) due

or to become due to that contractor in an amount sufficient to answer the claim stated in the stop notice and to provide for the public entity's reasonable cost of any litigation thereunder. The public entity may satisfy this duty by refusing to release money held in escrow pursuant to Section 10263 or 22300 of the Public Contract Code.

Cal. Civil Code §3210

§3210. Action to Enforce Stop Notice – Time of Commencement Thereof – Work of Improvement Subject to Acceptance by a Local Public Entity

An action against the original contractor and the public entity to enforce payment of the claim stated in the stop notice may be commenced at any time after 10 days from the date of the service of the stop notice upon the public entity and shall be commenced not later than 90 days following the expiration of the period within which stop notices must be filed as provided in Section 3184. * * *